No. 17-1657	
Title:	**Mission Product Holdings, Inc., Petitioner** **v.** **Tempnology, LLC, nka Old Cold LLC**
Docketed:	June 12, 2018
Linked with 17A1060	
Lower Ct:	United States Court of Appeals for the First Circuit
Case Numbers:	(16-9016)
Decision Date:	January 12, 2018
Questions Presented	

DATE	PROCEEDINGS AND ORDERS
Mar 27 2018	Application (17A1060) to extend the time to file a petition for a writ of certiorari from April 12, 2018 to June 11, 2018, submitted to Justice Breyer. **Main Document** **Lower Court Orders/Opinions** **Proof of Service**
Apr 02 2018	Application (17A1060) granted by Justice Breyer extending the time to file until June 11, 2018.
Jun 11 2018	Petition for a writ of certiorari filed. (Response due July 12, 2018) **Petition** **Appendix** **Certificate of Word Count** **Proof of Service**
Jun 28 2018	Waiver of right of respondent Tempnology, LLC, n/k/a Old Cold LLC to respond filed.
Jul 03 2018	DISTRIBUTED for Conference of 9/24/2018.
Jul 09 2018	Response Requested. (Due August 8, 2018)
Jul 11 2018	Brief amicus curiae of The International Trademark Association filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jul 20 2018	Motion to extend the time to file a response from August 8, 2018 to September 7, 2018, submitted to The Clerk. **Main Document** **Proof of Service**
Jul 24 2018	Motion to extend the time to file a response is granted and the time is extended to and including September 7, 2018.

Aug 08 2018	Brief amici curiae of Law Professors filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Sep 07 2018	Brief of respondent Tempnology, LLC, n/k/a Old Cold LLC in opposition filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Sep 25 2018	Reply of petitioner Mission Product Holdings, Inc. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Sep 26 2018	DISTRIBUTED for Conference of 10/12/2018.
Oct 22 2018	DISTRIBUTED for Conference of 10/26/2018.
Oct 25 2018	Letter of October 23, 2018 from counsel for respondent received. (Distributed) **Main Document**
Oct 26 2018	Letter of October 25, 2018 from counsel for petitioner received. (Distributed) **Main Document**
Oct 26 2018	Petition GRANTED limited to Question 1 presented by the petition.
Dec 10 2018	Brief of petitioner Mission Product Holdings, Inc. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Dec 10 2018	Joint appendix (2 volumes) filed. **Main Document** **Main Document**
Dec 12 2018	Brief amicus curiae of Intellectual Property Owners Association in support of neither party filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Dec 17 2018	Brief amicus curiae of United States filed. **Proof of Service** **Main Document**
Dec 17 2018	Brief amici curiae of Law Professors filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Dec 17 2018	Brief amicus curiae of New York Intellectual Property Law Association filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Dec 17 2018	Brief amicus curiae of American Intellectual Property Law Association in support of neither party filed. **Main Document** **Certificate of Word Count** **Proof of Service**

Dec 17 2018	Brief amicus curiae of The International Trademark Association filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Dec 21 2018	SET FOR ARGUMENT on Wednesday, February 20, 2019.
Dec 21 2018	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed. **Proof of Service** **Main Document**
Jan 09 2019	Brief of respondent Tempnology, LLC, n/k/a Old Cold LLC filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 11 2019	Record requested from the U.S.C.A. 1st Circuit.
Jan 15 2019	CIRCULATED
Jan 18 2019	Record from the U.S.C.A. 1st Circuit is electronic and located on PACER, with the exception of one envelop containing the Joint Appendix.
Jan 22 2019	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Feb 08 2019	Reply of petitioner Mission Product Holdings, Inc. filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Feb 20 2019	Argued. For petitioner: Danielle Spinelli, Washington, D. C.; and Zachary D. Tripp, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.) For respondent: Douglas Hallward-Driemeier, Washington, D. C.

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No. 17-

IN THE

Supreme Court of the United States

MISSION PRODUCT HOLDINGS, INC.,
Petitioner,

v.

TEMPNOLOGY, LLC, N/K/A OLD COLD LLC,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, under §365 of the Bankruptcy Code, a debtor-licensor's "rejection" of a license agreement—which "constitutes a breach of such contract," 11 U.S.C. §365(g)—terminates rights of the licensee that would survive the licensor's breach under applicable non-bankruptcy law.

2. Whether an exclusive right to sell certain products practicing a patent in a particular geographic territory is a "right to intellectual property" within the meaning of §365(n) of the Bankruptcy Code.

PARTIES TO THE PROCEEDING

Petitioner is Mission Product Holdings, Inc. Mission has no parent company and no publicly held company owns 10% or more of its stock.

Respondent is Tempnology, LLC, n/k/a Old Cold LLC.

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IN THE

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MISSION PRODUCT HOLDINGS, INC.,
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TEMPNOLOGY, LLC, n/k/a OLD COLD LLC,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Mission Product Holdings, Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

INTRODUCTION

This case presents two important and closely related questions regarding the rights retained by a licensee of intellectual property after a debtor-licensor rejects the license agreement in bankruptcy. Below, the First Circuit decided both questions wrongly, worsening an existing circuit split regarding the effect of rejection on a licensee's rights, and dramatically undermining the effectiveness of the provision Congress enacted to protect those rights. Its decision thus casts a cloud of

uncertainty over significant commercial transactions that are central to our nation's system for encouraging and rewarding innovation. It is critical that this Court step in to resolve the circuit split and dispel the confusion the First Circuit's decision creates.

1. The first question presented is whether a debtor-licensor's rejection of an intellectual property license agreement under §365 of the Bankruptcy Code[1]—which permits a debtor to "assume or reject any executory contract" and provides that rejection "constitutes a breach of such contract"—terminates the licensee's rights under the agreement. That question has given rise to a square, openly acknowledged, and long-standing division of authority among the courts of appeals, made deeper by the First Circuit's decision.

In 1985, the Fourth Circuit held that a debtor-licensor's rejection of an agreement to license technology terminated the licensee's right to use that technology. *Lubrizol Enters., Inc.* v. *Richmond Metal Finishers, Inc.*, 756 F.2d 1043, 1048 (4th Cir. 1985). *Lubrizol* was widely criticized for misunderstanding the effect of rejection, and Congress promptly enacted §365(n) to "correct[]" it, explaining that "[§]365 was [n]ever intended to be a mechanism for stripping innocent licensee[s] of rights." S. Rep. No. 100-505 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3200, 3203. Section 365(n) permits a licensee to retain its rights to "intellectual property," including any exclusivity rights, under a rejected license agreement. §365(n)(1)(B). "[I]ntellectual property" was defined to include, among other things, patents and copyrights, but not trademarks, *see*

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[1] Statutory citations are to 11 U.S.C. (the Bankruptcy Code) unless otherwise indicated.

§101(35A), which were "of concern" but viewed as warranting further study, S. Rep. No. 100-505, at 3204.

After §365(n)'s enactment, courts divided as to whether *Lubrizol*'s reasoning was applicable to trademarks or other rights not expressly protected by §365(n). In 2012, in *Sunbeam Products, Inc.* v. *Chicago Manufacturing, LLC*, 686 F.3d 372 (7th Cir. 2012), the Seventh Circuit answered that question no, holding that rejection of a trademark license does not strip the licensee of its right to use the trademark. Stating that "*Lubrizol* does not persuade us," the Seventh Circuit reasoned that under §365(g), rejection is simply "'a breach'" of the rejected contract, and "in bankruptcy, as outside of it," following a breach, "the other party's rights remain in place." *Id.* at 376-378.

Below, the First Circuit was faced with the same question and reached the opposite conclusion. Recognizing that "other circuits [were] split," the First Circuit refused to follow *Sunbeam*. App. 2a. Aligning itself with *Lubrizol*, the court held that when the debtor-licensor, Tempnology LLC, rejected its license agreement with Mission, Mission lost all rights under the agreement that the court determined were not expressly protected by §365(n), including its trademark rights.

The split of authority is plain and squarely presented. And the First Circuit is wrong. Its holding contravenes the text and purpose of the Bankruptcy Code, as well as the weight of authority among courts and scholars regarding the meaning of rejection. Rejection of an executory contract is merely a breach. It enables the debtor to decline to perform its future obligations under a contract if the cost of doing so outweighs the contract's benefit to the estate. And it allows the estate to pay the resulting damages pro rata (typically in cents

on the dollar) along with other claims that arose before the bankruptcy filing. But it does not enable the debtor to take back rights already granted to a licensee so that the debtor can cut a better deal for those rights.

2. The First Circuit compounded its error by holding that Mission's exclusive right to sell certain products practicing Tempnology's patents in the United States was not a "right to intellectual property" protected by §365(n). If this Court grants review of the first question presented—and it should—it should also grant review of this second, related question.

The First Circuit's crabbed reading of §365(n) is both clearly wrong and potentially far-reaching in its implications. A patent *is*, among other things, the right to sell the patented invention and to exclude others from selling it. The Patent Act says so. *See* 35 U.S.C. §154(a)(1). An agreement granting a licensee the exclusive right to sell products practicing a patented invention thus conveys one of the central rights the patentholder possesses. Nor does it matter, as the First Circuit seemingly believed, whether such an exclusive right encompasses all products that can be made with the patent or only some such products. A license need not transfer every stick in the bundle of patent rights to grant an exclusive right to intellectual property. Indeed, exclusive licenses to sell products practicing a patented invention within a particular field of use are extremely common, and a key part of the licensing scheme Congress sought to protect in §365(n). Until this case, to Mission's knowledge, it has never been suggested that such licenses do not convey rights to intellectual property.

3. Together, the First Circuit's mistaken holdings reinstate much of the confusion *Lubrizol* caused and

that Congress thought it had resolved with §365(n). Cutting off licensees' rights when a license agreement is rejected in bankruptcy "impose[s] a burden on American technological development that was never intended by Congress in enacting [§]365." S. Rep. No. 100-505, at 3200. Uncertainty as to the fate of those rights has the same effect, making it harder for licensees to be confident their rights are secure and thus harder for intellectual property owners to license that property.

As this Court has recognized, "[t]he Bankruptcy Code standardizes an expansive (and sometimes unruly) area of law" that requires courts to "interpret the Code clearly and predictably." *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 566 U.S. 639, 649 (2012). The long-standing division of authority on the meaning of one of bankruptcy's central concepts, "rejection"—and the First Circuit's unprecedented narrowing of the Code's definition of "intellectual property"—demand this Court's review.

OPINIONS BELOW

The First Circuit's opinion (App. 1a-34a) is reported at 879 F.3d 389. The bankruptcy appellate panel's opinion (App. 35a-65a) is reported at 559 B.R. 809. The bankruptcy court's opinion (App. 69a-81a) is reported at 541 B.R. 1. The bankruptcy court's orders (App. 67a-68a, 83a-84a) are unpublished.

JURISDICTION

The First Circuit entered judgment on January 12, 2018. App. 1a. By order dated April 2, 2018 (Docket No. 17A1060), Justice Breyer granted an extension of time to file the petition until June 11, 2018. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

11 U.S.C. §365 provides in relevant part[2]:

(a) Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.

***

(g) Except as provided in subsections (h)(2) and (i)(2) of this section, the rejection of an executory contract or unexpired lease of the debtor constitutes a breach of such contract or lease—

> (1) if such contract or lease has not been assumed under this section or under a plan confirmed under chapter 9, 11, 12, or 13 of this title, immediately before the date of the filing of the petition[.]

***

(n)(1) If the trustee rejects an executory contract under which the debtor is a licensor of a right to intellectual property, the licensee under such contract may elect—

> (A) to treat such contract as terminated by such rejection if such rejection by the trustee amounts to such a breach as would entitle the licensee to treat such contract as terminated by virtue of its own terms, applicable nonbankruptcy law, or an agreement made by the licensee with another entity; or

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[2] Section 365 is reproduced in full at App. 85a-101a.

(B) to retain its rights (including a right to enforce any exclusivity provision of such contract, but excluding any other right under applicable nonbankruptcy law to specific performance of such contract) under such contract and under any agreement supplementary to such contract, to such intellectual property (including any embodiment of such intellectual property to the extent protected by applicable nonbankruptcy law), as such rights existed immediately before the case commenced, for—

(i) the duration of such contract; and

(ii) any period for which such contract may be extended by the licensee as of right under applicable nonbankruptcy law.

***

11 U.S.C. §101(35A) provides:

The term "intellectual property" means–

(A) trade secret;

(B) invention, process, design, or plant protected under title 35;

(C) patent application;

(D) plant variety;

(E) work of authorship protected under title 17; or

(F) mask work protected under chapter 9 of title 17;

to the extent protected by applicable nonbankruptcy law.

STATEMENT

A. Statutory Background

1. Section 365(a) of the Bankruptcy Code provides that a bankruptcy trustee or debtor-in-possession,[3] with court approval, "may assume or reject any executory contract or unexpired lease of the debtor." An executory contract is one "'on which performance is due to some extent on both sides.'" *NLRB* v. *Bildisco & Bildisco*, 465 U.S. 513, 522 n.6 (1984). Put differently, executory contracts are contracts that represent both an asset of the debtor—the right to obtain the counterparty's future performance—and a liability of the debtor—its obligation to perform in the future. *See* Andrew, *Executory Contracts in Bankruptcy: Understanding 'Rejection,'* 59 U. Colo. L. Rev. 845, 855 (1988) (hereinafter "Andrew"); Westbrook, *A Functional Analysis of Executory Contracts*, 74 Minn. L. Rev. 227, 247-255 (1989) (hereinafter "Westbrook").

Section 365 enables the debtor to determine whether such a contract provides a net benefit or net detriment to the estate. The debtor may then choose to "assume" the contract—reaffirming that the estate will perform the debtor's obligations under the contract—or to "reject" the contract—declining to perform the debtor's future obligations under the contract and giving the counterparty a claim for damages for breach.

If the debtor determines that the value of the counterparty's future performance exceeds the cost of its own future performance, it may assume the contract.

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[3] In Chapter 11 cases, the debtor typically remains in possession of the bankruptcy estate and assumes the rights and duties of a trustee. *See* §§1101, 1107(a). For simplicity, the trustee or debtor-in-possession will be referred to here as the debtor.

In that case, its obligations under the contract are treated as administrative expenses of the estate, which must be paid in full before any distribution is made to lower-priority claims, including general unsecured claims that arose "pre-petition," before the bankruptcy filing. §§365(b), 503(b)(1), 507(a)(2), 726(a), 1129(a)(9).

If, on the other hand, the debtor decides that the cost of performing its future obligations under the contract outweighs the benefit of the counterparty's future performance, it may reject the contract. The "rejection of an executory contract ... constitutes a breach of such contract or lease ... immediately before the date of the filing of the petition." §365(g)(1). That breach gives the counterparty to a rejected contract a claim against the debtor's estate for any damages arising from the breach. §502(g)(1). But because the breach is deemed to occur before the bankruptcy filing, the damages claim is treated like other pre-petition claims, which are typically paid cents on the dollar.

2. Thirty years ago, in *Lubrizol*, the Fourth Circuit analyzed the effect of rejection of an intellectual property license agreement under §365. The court held that a debtor's rejection of such an agreement not only relieved the debtor of its future performance obligations, but also stripped the licensee of its right to continue using the licensed intellectual property, enabling the debtor to take back the license and sell or license the technology to a third party. 756 F.2d at 1047-1048.

3. Congress quickly expressed its disagreement with *Lubrizol* by enacting §365(n). Section 365(n) was designed "to make clear that the rights of an intellectual property licensee to use the licensed property cannot be unilaterally cut off as a result of the rejection of the license pursuant to [§]365." S. Rep. No. 100-505, at

3200; *see id.* at 3201-3202 ("Congress never anticipated that ... the licensee would lose not only any future affirmative performance required of the licensor under the license, but also any right of the licensee to continue to use the intellectual property as originally agreed in the license agreement.").

Section 365(n) provides that when a debtor rejects a contract "under which the debtor is a licensor of a right to intellectual property," the licensee may elect either to treat the contract as terminated or to "retain its rights (including a right to enforce any exclusivity provision of such contract ...) under such contract ... to such intellectual property." §365(n)(1)(B).

At the same time, Congress enacted §101(35A), which defined "intellectual property" to include, among other things, "any invention, process, design, or plant protected under title 35" (the Patent Act), copyrights, and trade secrets. The definition of "intellectual property" did not, however, include trademarks. The Senate Report noted that "rejection [of trademark licenses] is of concern because of the interpretation of [§]365 by the *Lubrizol* court," but explained that "these matters could not be addressed without more extensive study," and thus "it was determined to postpone congressional action in this area." S. Rep. No. 100-505, at 3204.

B. Factual Background

Debtor Tempnology is a New Hampshire-based company that developed chemical-free cooling fabrics, on which it held issued and pending patents. App. 2a-3a, 36a. Using those fabrics, it produced specialized clothing and accessories like towels, socks, and headbands that were designed to remain cool when used

during exercise. App. 2a. Tempnology marketed these products using the COOLCORE and DR. COOL trademarks. *Id.*

On November 21, 2012, Mission and Tempnology executed a Co-Marketing and Distribution Agreement (the "Agreement"). App. 3a. The Agreement granted Mission a non-exclusive, worldwide, perpetual license to use for any purpose (including manufacture and sale) all of Tempnology's products, inventions, and designs and all of Tempnology's intellectual property rights (other than trademarks and domain names) with respect to those products, inventions, and designs. Agreement §15(b), App. 120a-121a. The Agreement also granted Mission a non-exclusive, worldwide (except for certain countries in East Asia) license to use Tempnology's trademarks on the Tempnology products Mission distributed (the "Cooling Accessories") for the term of the Agreement. Agreement §15(d), App. 123a-125a.

Importantly, the Agreement also carved out a territory for Mission—primarily consisting of the United States—in which Mission had the *exclusive* right to sell certain products (the "Exclusive Cooling Accessories"). Agreement §1(A)-(B), App. 103a-105a. Tempnology agreed that, within Mission's exclusive territory, it would not sell the Exclusive Cooling Accessories itself or license them to others. Agreement §§5-6, App. 109a-117a. In other words, the Agreement gave Mission the non-exclusive right to sell certain patented and trademarked Tempnology products throughout the world and the exclusive right to sell a subset of those patented and trademarked products within the United States. *See* Agreement §1(B), App. 105a.

The Agreement permitted either party to give notice of its intent to terminate the contract without cause, which would trigger a two-year wind-down period during which the Agreement's terms would remain in effect. It also permitted either party to terminate the Agreement immediately if the other party failed to cure a material breach. Agreement §3, App. 106a-108a. On June 30, 2014, Mission exercised its right to terminate the Agreement without cause, triggering the Agreement's wind-down period. App. 4a. The next month, Tempnology purported to terminate the Agreement for cause and stopped performing under the Agreement. *Id.* In June 2015, an arbitrator ruled that Tempnology's purported termination for cause was improper and that the Agreement remained in effect throughout the wind-down period—until July 1, 2016. App. 4a-5a, 40a. A second phase of arbitration was set to address Mission's claim that Tempnology had breached the Agreement by failing to perform. App. 40a.

On September 1, 2015, Tempnology filed a voluntary petition for Chapter 11 bankruptcy, halting the arbitration proceedings. App. 5a; *see* §362.

C. Procedural History

1. The day after its bankruptcy filing, Tempnology moved to reject the Agreement under §365(a). App. 5a. Mission objected to the motion and elected to retain its rights to intellectual property protected by §365(n). App. 6a. The bankruptcy court granted Tempnology's rejection motion, but noted that its order was "subject to Mission['s] election to preserve its rights under ... §365(n)." App. 83a-84a.

In response, Tempnology filed a motion asking the bankruptcy court to determine the scope of the rights Mission would retain after rejection of the Agreement. App. 6a. The bankruptcy court noted that there was "no ... dispute[]" that Mission retained its non-exclusive, worldwide license to use Tempnology's patents post-rejection, but held that rejection of the Agreement terminated Mission's trademark and exclusive-distribution rights. App. 78a-81a.

2. Mission appealed to the Bankruptcy Appellate Panel for the First Circuit ("BAP"), which affirmed the bankruptcy court's holding that Mission could not retain its exclusive-distribution rights. App. 49a-51a.

The BAP reversed, however, as to Mission's trademark rights, adopting the Seventh Circuit's reasoning in *Sunbeam*—that rejection is merely a breach and does not enable a debtor-licensor to revoke rights already granted to a licensee. App. 51a-60a; *see Sunbeam*, 686 F.3d at 376-377. The BAP concluded that "rejection of the Agreement did not vaporize Mission's trademark rights under the Agreement." App. 60a. Rather, "[w]hatever post-rejection rights Mission retained in [Tempnology's] trademark and logo [we]re governed by the terms of the Agreement and applicable non-bankruptcy law." *Id.*

3. On appeal, a divided First Circuit disagreed with the BAP in part and affirmed the bankruptcy court in full. App. 2a.

The court first agreed with the BAP that rejection terminated Mission's exclusive-distribution rights, reasoning that Mission's exclusive right to sell certain products practicing the licensed patents in the United States was not protected under §365(n). App. 12a-20a. In the court's view, "the right to sell a product is

clearly not included within [the Bankruptcy Code's] definition of intellectual property," even though the court acknowledged that the products at issue were "made using a patent" that Tempnology had licensed to Mission. App. 15a. The court also opined that the exclusive-distribution right was not a right to intellectual property because the "only thing that is exclusive is the right to sell certain products, not the right to practice, for example, the patent that is used to make those products." *Id.*

The panel split 2-1 regarding the trademark rights, with the majority holding that rejection terminated those rights. App. 20a-27a. The majority recognized that the omission of trademarks from the Code's definition of "intellectual property" did not resolve the question, which turned on "exactly what rejection means" under §365. App. 20a-22a. Addressing that issue, the majority expressly refused to follow *Sunbeam* and endorsed the Fourth Circuit's reasoning in *Lubrizol*, holding that rejection stripped Mission of its right to use Tempnology's trademarks, leaving it with only a prepetition damages claim. App. 27a.

In reaching that conclusion, the majority opined that the Seventh Circuit's decision contravened "Congress's principal aim" in providing for rejection under §365—"'releas[ing] the debtor's estate from burdensome obligations that c[ould] impede a successful reorganization.'" App. 22a. The majority reasoned that it was not "possible to free a debtor from any continuing performance obligations under a trademark license even while preserving the licensee's right to use the trademark," stating that Tempnology would be required to "monitor and exercise control over the quality of the goods" produced by Mission to protect the "continued validity" of its trademarks. App. 22a-23a.

Accordingly, the majority concluded, it "favor[ed] the categorical approach of leaving trademark licenses unprotected from court-approved rejection, unless and until Congress should decide otherwise." App. 27a.[4]

In dissent, Judge Torruella "disagree[d] with the majority's bright-line rule" that Tempnology's rejection left Mission "without any remaining rights to use [Tempnology's] trademark and logo." App. 29a. He criticized the majority for "treat[ing] a debtor's rejection as a contract cancellation, rather than a contractual breach." App. 32a. The BAP, he concluded, "was correct to follow the Seventh Circuit's lead in finding that ... [Tempnology's] rejection of the executory contract d[id] not rescind the Agreement" and did not "eviscerate any of Mission's remaining trademark rights." App. 33a-34a.

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[4] The First Circuit did not address Mission's argument that under *Sunbeam*'s correct interpretation of §365(g), rejection could not terminate its exclusive-distribution rights even if those rights were not protected by §365(n). The court stated that, in its view, the argument was not properly raised below and was waived. App. 20a. Mission disagrees. But, in any event, because the First Circuit squarely addressed and rejected *Sunbeam*'s interpretation of the statute in deciding the trademark issue, any purported waiver is no obstacle to granting review of the *Sunbeam* question in this case. Should this Court grant certiorari and reverse on that question, the application of its ruling to Mission's exclusive-distribution rights in light of any procedural waiver arguments can and should be addressed on remand.

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD GRANT REVIEW OF THE QUESTION WHETHER REJECTION TERMINATES A LICENSEE'S RIGHTS

A. There Is A Square, Entrenched, And Openly Acknowledged Circuit Split On The Question

The First Circuit's decision openly chooses sides—rejecting the Seventh Circuit's position and aligning itself with the Fourth Circuit—in a long-standing circuit split on a fundamental bankruptcy question: the effect of a debtor's rejection of an executory contract, and, in particular, an agreement to license intellectual property. This conflict—resulting in dramatically different outcomes for licensees based on the happenstance of where the licensor declares bankruptcy—is entrenched and will not resolve itself without this Court's intervention. Review is warranted to restore uniformity on this question of exceptional importance.

1. The Fourth Circuit

In *Lubrizol Enterprises, Inc.* v. *Richmond Metal Finishers, Inc.*, 756 F.2d 1043 (4th Cir. 1985), the Fourth Circuit held that a debtor-licensor's rejection of an agreement to license intellectual property—there, a metal-coating process—terminated the licensee's right to continue using the intellectual property, allowing the debtor to sell or license it to a third party without any limitations imposed by the license previously granted. *Id.* at 1047-1048.

Although the court acknowledged that "§365(g) ... treat[s] rejection as a breach," in its view, "the legislative history of §365(g) makes clear that the purpose of the provision is to provide only a damages remedy for the non-bankrupt party." *Lubrizol*, 756 F.2d at 1048.

Hence, the court reasoned, the licensee "could not seek to retain its contract rights in the technology by specific performance even if that remedy would ordinarily be available upon breach of this type of contract." *Id.* The Fourth Circuit recognized that its decision "impose[d] serious burdens upon contracting parties" and "could have a general chilling effect upon the willingness" of parties "to contract at all with businesses in possible financial difficulty," but it concluded that Congress "plainly provided for the rejection of executory contracts, notwithstanding the obvious adverse consequences." *Id.*

Lubrizol has been intensely criticized for both its result and its reasoning—in particular, its view that rejection of a license agreement does not merely excuse the debtor from future performance obligations, but also allows the debtor to take back rights to intellectual property already granted to the licensee. *See, e.g.*, *Sunbeam Prods., Inc.* v. *Chicago Am. Mfg.*, 686 F.3d 372, 377 (7th Cir. 2012) ("Scholars uniformly criticize *Lubrizol*."); *In re SIMA Int'l, Inc.*, 2018 WL 2293705, at *4 (Bankr. D. Conn. May 17, 2018) ("This Court, like many others, does not endorse the reasoning in *Lubrizol* and is not alone in concluding that its reasoning is flawed."); Baird, *Elements of Bankruptcy* 122-123 & n.9 (6th ed. 2014) (hereinafter "Baird") ("*Lubrizol* ... interpreted the power to reject too expansively."); Westbrook at 240, 305-315 (*Lubrizol* is "deeply disruptive of commercial expectations and needs.").

As discussed above, Congress found a partial solution in §365(n), which overruled *Lubrizol*'s holding with respect to licenses of certain types of intellectual property and made clear that Congress viewed the decision as mistaken. *See supra* pp. 9-10. But the legislation did not explicitly resolve the question whether *Lubrizol*'s

view of the effect of rejection applied to intellectual property rights not clearly covered by §365(n), including trademark rights.

That question has now divided lower courts for three decades. Some have concluded that, because trademarks were omitted from the definition of "intellectual property" protected by §365(n), "*Lubrizol* controls and the [licensee's] right to use the trademarks stops on rejection." *In re HQ Global Holdings, Inc.*, 290 B.R. 507, 513 (Bankr. D. Del. 2003); *see also, e.g.*, *In re Old Carco LLC*, 406 B.R. 180, 211 (Bankr. S.D.N.Y. 2009); *In re Centura Software Corp.*, 281 B.R. 660, 668-674 (Bankr. N.D. Cal. 2002); *In re Backstone Potato Chip Co.*, 109 B.R. 557 (Bankr. D.R.I. 1990). Others have held that licensees' rights should not "succumb to the interests of maximizing the bankruptcy estate," especially when those rights are part of the same "licensing system which Congress sought to protect." *In re Crumbs Bake Shop, Inc.*, 522 B.R. 766, 772 (Bankr. D.N.J. 2014).

2. The Seventh Circuit

In *Sunbeam*, the Seventh Circuit held that rejection of a trademark license does *not* terminate the licensee's right to use the debtor's trademarks. 686 F.3d at 376-378. The court expressly refused to follow *Lubrizol*, recognizing that its decision "create[d] a conflict among the circuits." *Id.* at 378 ("*Lubrizol* does not persuade us.").

The facts in *Sunbeam* were very similar to those here: The debtor-licensor contracted with the licensee to manufacture and sell box fans using the debtor's patents and trademarks. 686 F.3d at 374. The debtor filed for bankruptcy, rejected the license agreement,

and argued that the debtor could no longer sell the trademarked box fans. *Id.*

In holding that rejection did not terminate the licensee's rights, *Sunbeam* first concluded that §365(n) created no inference that Congress "codified *Lubrizol* with respect to trademarks." 686 F.3d at 375. "[A]n omission is just an omission," the court explained, noting that the "limited definition [of 'intellectual property'] in §101(35A) means that §365(n) does not affect trademarks one way or the other." *Id.* It also noted that the legislative history indicated that "the omission [of trademarks] was designed to allow more time for study, not to approve *Lubrizol*." *Id.*

Sunbeam went on to reject the reasoning and holding of *Lubrizol*, asserting that the decision was "mistaken" and did not "correctly underst[an]d §365(g)." 686 F.3d at 376. Rather, in the Seventh Circuit's view, *Lubrizol* "confuse[d] rejection," which merely "'constitutes a breach'" under §365(g), "with ... an avoiding power"—that is, a trustee's or debtor-in-possession's limited power to unwind a deal made before bankruptcy as a fraudulent transfer or preference. *Id.* at 376-377; *see infra* pp. 22-25.

The Seventh Circuit explained that "[w]hat §365(g) does by classifying rejection as [a] breach is establish that in bankruptcy, as outside of it, the other party's rights remain in place." *Sunbeam*, 686 F.3d at 377. The "debtor's unfulfilled obligations are converted to damages" that are "treated as a pre-petition obligation, which may be written down in common with other debts of the same class." *Id.* "But nothing about this process implies that any rights of the other contracting party have been vaporized." *Id.* "Outside of bankruptcy, a licensor's breach does not terminate a licensee's

right to use intellectual property." *Id.* at 376. Thus, because "outside of bankruptcy, [the debtor] could not have ended [the licensee's] right to sell the [trademarked] box fans by failing to perform its own duties" under the agreement, the Seventh Circuit concluded that the debtor could not terminate that right through its rejection of the agreement in bankruptcy. *Id.* at 377.[5]

Although *Sunbeam* involved a trademark license, the Seventh Circuit's reasoning is not limited to trademarks. Rather, its interpretation of "rejection" under §365 applies equally to other rights granted to licensees, including, as relevant here, Mission's exclusive right to distribute certain products practicing Tempnology's patents within the United States.

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[5] The Third Circuit has also addressed a case in which a debtor-licensor rejected a trademark license. *See In re Exide Techs.*, 607 F.3d 957 (3d Cir. 2010). The majority did not reach the question of the effect of rejection on the licensee's trademark rights, concluding that the contract was not executory and thus could not be rejected. *Id.* at 963-964. But in concurrence, Judge Ambro opined that the trademark licensee's rights should survive rejection in any event. *Id.* at 967. He explained that rejection "free[s] a bankrupt trademark licensor from burdensome duties that hinder its reorganization," but it does not "let a licensor take back trademark rights it bargained away." *Id.* Bankruptcy courts, he opined, should use "their equitable powers to give [the debtor] a fresh start without stripping [the licensee] of its fairly procured trademark rights"; otherwise, debtors could improperly use "bankruptcy more [as] a sword than a shield." *Id.* at 967-968. Although the Seventh Circuit reached the same outcome for some of the same reasons, it rejected the suggestion that courts should use an "equitable" approach, instead focusing its analysis on the text of §365(g). *Sunbeam*, 686 F.3d at 375-376.

3. The First Circuit

As noted above, *see supra* pp. 14-15, the First Circuit's decision discussed both *Lubrizol* and *Sunbeam*, acknowledging that "other circuits are split" on the question of the effect of rejection on a licensee's rights. App. 2a. The majority expressly disagreed with *Sunbeam*'s conclusion that rejection does not terminate a licensee's rights that would survive the licensor's breach outside bankruptcy. Rather, it sided with the Fourth Circuit's interpretation of "rejection" in *Lubrizol*, holding that "rejection converts the [licensee's] right into a pre-petition claim for damages." App. 22a.

The law of the First and Fourth Circuits is thus squarely at odds with the law of the Seventh Circuit on an important and recurring question of bankruptcy law regarding the effect of "rejection" of a license agreement like this one. The split will not heal itself. It requires this Court's intervention.

B. The First Circuit's Decision Is Wrong

The First Circuit's holding that rejection of a license agreement terminates a licensee's rights is contrary to the text and purpose of the Bankruptcy Code. As the Seventh Circuit recognized in *Sunbeam*, rejection of an executory license agreement does not terminate the licensee's rights. By treating rejection as a breach, §365 makes clear that if the licensee's rights under the agreement would survive the debtor's breach outside bankruptcy, they survive rejection inside bankruptcy. And as *Sunbeam* also recognized, trademarks are no exception to that rule.

1. Rejection does not terminate a counterparty's rights

The text of the Bankruptcy Code specifies the effect of rejection of an executory contract: Rejection "constitutes a breach of such contract ... immediately before the date of the filing of the [bankruptcy] petition." §365(g)(1). Rejection is nothing more than that. It does not grant the debtor any special powers. Rather, the debtor has the same option in bankruptcy that it would have outside bankruptcy to stop performing its remaining unfulfilled obligations under the contract and instead pay damages to the counterparty. The principal benefit to the debtor of rejecting an executory contract is that the obligation to pay damages for the breach is treated as a prepetition claim, §502(g), and therefore typically paid at cents on the dollar.

As most recent court decisions and scholars have recognized, rejection does not "impl[y] that any rights of the other contracting party have been vaporized." *Sunbeam*, 686 F.3d at 377. "[C]ontract rejection [is not] the functional equivalent of a rescission, rendering void the contract and requiring that the parties be put back in the positions they occupied before the contract was formed." *Thompkins* v. *Lil' Joe Records, Inc.*, 476 F.3d 1294, 1306 (11th Cir. 2007). Rather, "'[r]ejection merely frees the estate from the obligation to perform'" the debtor's unfulfilled obligations. *Id.*; *see also In re Exide Techs.*, 607 F.3d 957, 965 (3d Cir. 2010) (Ambro, J., concurring) ("'[R]ejection is a breach of the executory contract. It is not avoidance, rescission, or termination.'"); Andrew at 848 ("[R]ejection is not the revocation ... or cancellation of a contract'" and "does not change the substantive rights of the parties to the contract.").

Lubrizol's contrary rule—embraced by the First Circuit below—has been roundly criticized by courts and scholars for misconstruing rejection as an "avoiding" power that enables the debtor to undo an already completed deal the debtor made before bankruptcy. *Sunbeam*, 686 F.3d at 377 ("*Lubrizol* ... confuses rejection with the use of an avoiding power."); Baird at 123 & n.10 ("[R]ecent Circuit opinions repudiate *Lubrizol*"; "[c]ourts ... tend towards the view that rejection is not an avoidance power" that enables "debtors [to] recapture intellectual property such as trademarks" and that, instead, "the third party can continue to use the trademark."); Andrew at 916 (*Lubrizol* is "[t]he case that illustrates perhaps better than any other what is wrong with avoiding-power rejection.").

The trustee or debtor-in-possession in bankruptcy does have an "avoiding" power that enables it to undo certain pre-bankruptcy transactions, but it is a limited power found elsewhere in the Bankruptcy Code. For instance, if the debtor had licensed its intellectual property for "less than reasonably equivalent value" while insolvent, that transaction could potentially be unwound as a "fraudulent transfer" and the intellectual-property rights returned to the estate. *See, e.g.*, §548(a)(1)(B)(i) (permitting trustee to avoid certain transfers of property made within two years before bankruptcy if the debtor "received less than a reasonably equivalent value in exchange for such transfer" while insolvent); *Sunbeam*, 686 F.3d at 377 ("Bankruptcy law does provide means for eliminating rights under some contracts" pursuant to the "trustee['s] avoiding powers.").

By contrast, §365 does not permit the debtor to reclaim for the estate interests in property that the debtor already conveyed to the counterparty. "Section 365

is not an avoiding power designed to expand the assets of the estate and give creditors inside of bankruptcy something they would not have had outside." Baird at 115. Indeed, it is a basic principle of bankruptcy law that the estate has no greater rights in the debtor's property than the debtor itself held outside bankruptcy. *See* §541(a)(1) (bankruptcy estate includes "legal or equitable interests of the debtor in property as of the commencement of the case"); *see also Butner* v. *United States*, 440 U.S. 48, 54-55 (1979); *Board of Trade* v. *Johnson*, 264 U.S. 1 (1924); Baird at 95. If the debtor's assets would be limited in the debtor's hands by interests granted to third parties—such as a license of rights to its intellectual property—those assets are equally limited in the hands of the trustee or debtor-in-possession inside bankruptcy.

Section 365 does not change that. "Nothing about the nature of 'rejection' requires that the trustee be able to undo (or 'avoid') what is tantamount to a consummated property transfer." Baird at 119. Indeed, "terminating rights in or to property arising under contracts that happen to be 'executory' is fundamentally contrary to general bankruptcy principles, to the history and purpose of executory contracts doctrine itself, and to common sense." Andrew at 849. If the debtor's breach of the contract would not terminate the licensee's rights outside bankruptcy, rejection does not do so inside bankruptcy.

Outside bankruptcy, for example, if a landlord breaches its obligations under a lease of real property—such as the obligation to heat or maintain the property—the lease is not terminated, and the landlord cannot evict the tenant. As the Seventh Circuit explained, the same is true in bankruptcy: "[A] lessor that enters bankruptcy could not, by rejecting the lease, end the

tenant's right to possession and thus re-acquire premises that might be rented out for a higher price. The bankrupt lessor might substitute damages for an obligation to make repairs, but not rescind the lease altogether." *Sunbeam*, 686 F.3d at 377.[6]

Intellectual property licenses work the same way. They convey to the licensee an interest in the licensor's intellectual property—not ownership of the entire bundle of rights to the property, but particular sticks in the bundle. *See Impression Prods., Inc.* v. *Lexmark Int'l, Inc.* 137 S. Ct. 1523, 1534 (2017) (a licensor is "exchanging rights" with a licensee and is "free to relinquish only a portion of its bundle of patent protections"). Outside bankruptcy, a licensor's breach of its obligations under a license agreement would not entitle it to retract the license already granted, and rejection should not entitle the licensor to do so in bankruptcy. *See, e.g., Sunbeam*, 686 F.3d at 376-377; *Exide*, 607 F.3d at 967 (Ambro, J., concurring) ("Courts may use §365 to free a bankrupt trademark licensor from burdensome duties that hinder its reorganization. They should not ... use it to let a licensor take back trademark rights it bargained away."); Westbrook at 308 ("[C]ontract doctrine would not permit the breacher *to benefit from its own breach* by revoking the license.... No bankruptcy rule or policy requires ... reversal of [that] state law.").

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[6] Section 365(h) of the Bankruptcy Code codifies this result, while limiting the lessee's remedy for any post-petition failure to perform by the debtor to a set-off against rent owed. But even without §365(h), as *Sunbeam* makes clear, rejection would not permit the debtor to evict the lessee and take back a property interest already conveyed. *See also* S. Rep. No. 100-505, at 3203 (§365(h) "clarified" that rejection by a lessor could not terminate a lease).

Congress expressly endorsed this understanding of §365—and spurned *Lubrizol*'s interpretation—when it enacted §365(n), explaining that "Congress never anticipated" that the bankruptcy of a licensor "would subject the licensee to the risk" of losing its "right ... to continue to use the intellectual property." S. Rep. No. 100-505, at 3201-3202; *see id.* at 3201 (*Lubrizol* improperly "relieved the debtor not simply of its ongoing affirmative performance obligations ... but also of its passive obligation to permit the licensee to use the intellectual property"); Baird at 123 ("Congress embraced the idea that rejection ... should not allow the trustee to recapture rights that the debtor has already conveyed away.").

The license agreement in this case granted Mission, among other things, the nonexclusive right to use Tempnology's patents and sell its patented products worldwide, the nonexclusive right to use its trademarks, and the exclusive right to sell certain patented and trademarked products in the United States. It also imposed affirmative obligations on both parties that were still unperformed at the time of the bankruptcy filing. For instance, Tempnology was obligated to use commercially reasonable efforts to launch three new products a year. Agreement §13, App. 118a. In bankruptcy, as outside of bankruptcy, Tempnology could decide to breach that obligation and pay damages. But Tempnology could not, through its own breach of the contract, take away the rights it had already granted to Mission. All of those rights—including Mission's right to use Tempnology's trademarks and its exclusive right to sell certain patented and trademarked products—should have survived rejection.

Indeed, lower courts have already recognized that the First Circuit's decision "resurrects the *Lubrizol*

rationale," fails to heed "the plain language" of §365, and "is plainly contrary to Congress' explicit efforts to rebalance affected rights on intellectual property." *SIMA*, 2018 WL 2293705, at *7-8.

2. Neither §365(n) nor trademark law supports a different result for trademarks

Nothing about the Bankruptcy Code's definition of "intellectual property" or about trademarks themselves suggests that trademarks should be an exception to the basic principles governing rejection.

The omission of trademarks from the Code's definition of "intellectual property" does not create any inference that trademark rights do not survive rejection. As *Sunbeam* explained, an "omission is just an omission" and "does not affect trademarks one way or the other." 686 F.3d at 375; *Exide*, 607 F.3d at 966-967 (Ambro, J., concurring) (same). Indeed, rather than endorsing *Lubrizol*'s result for trademarks, the Senate Report emphasized that, while "it was determined to postpone congressional action" on trademarks, "rejection [of trademark licenses] [was] of concern because of the interpretation of [§]365 by the *Lubrizol* court." S. Rep. No. 100-505, at 3204. "Setting out the rule explicitly" in §365(n) as to the intellectual property rights specifically addressed in *Lubrizol* thus "does not require the inference that Congress was repudiating the general principle elsewhere"; to the contrary, "[d]rawing a negative inference" that trademark licenses can be rescinded by rejection "assumes a notion of the rejection power that has no basis in history and makes little sense." Baird at 118, 123; Andrew at 928-929 (same).

Equally flawed is the First Circuit's reasoning that rejection terminated Mission's trademark license because, if the license were preserved, Tempnology would have had to monitor and control the quality of the trademarked products. App. 23a-27a. The license agreement did not create any such duty. At most, the Agreement gave Tempnology a right, but not an obligation, to monitor and control Mission's use of its trademarks. Agreement §15(d), App. 123a-125a.

To be sure, trademark law may require trademark owners to monitor licensees if they wish to protect their rights in their mark. App. 23a-24a (discussing "naked license" doctrine). But that obligation is not created by the parties' agreement and cannot be "rejected" in bankruptcy. *See SIMA*, 2018 WL 2293705, at *7 n.24 ("[T]he legal rigors of trademark policing, *not* contractual obligations, imposed upon the licensor to monitor its trademarks[,] are the source of the debtor's burdens."). Rejection merely frees the debtor from fulfilling its affirmative performance obligations under the rejected contract; it does not exempt the debtor from obligations imposed by other applicable law.

If the debtor believes its trademarks are worth the cost of monitoring, it will presumably incur that cost to preserve the value of the asset; if it does not, it presumably will not incur those costs. That decision is no different than the cost-benefit analysis debtors undertake every day when deciding whether to make an investment in an estate asset to maximize its value. It has no bearing on the question whether rejection terminates a licensee's trademark rights.

C. The Question Is Important And Ripe For Resolution

1. Whether licensors may strip licensees of their rights under trademark licenses, exclusive distribution agreements, and similar contracts by filing for bankruptcy and rejecting the contracts is a question of exceptional commercial importance. Resolving this question will provide much needed certainty for the expectations of contracting partners, facilitating economically advantageous relationships between licensors and licensees and other contracting parties. A licensee who is confident that the licensor's bankruptcy will not upend its continued right to use licensed trademarks or sell the debtor's products under an exclusive-distribution agreement will be more inclined to enter into an agreement that creates net efficiencies for distribution and production arrangements.

This concern is especially salient in the context of economically distressed licensors. Under the First Circuit's rule, a licensee who contracts with a financially unstable licensor risks losing the benefit of its bargain should that licensor file for bankruptcy and reject the license. That risk will either force the licensee to demand additional compensation for the uncertainty, or scuttle what would have been an otherwise economically productive deal. *Cf.* S. Rep. No. 100-505, at 3202-3203 (explaining that risk of loss of intellectual-property rights when licenses are rejected in bankruptcy discourages parties from entering into licensing arrangements and thereby threatens to impede technological development and innovation). Regardless of the result the Court reaches, establishing a definitive answer will allow commercial actors to conform their behavior to a settled rule of law.

2. Although the circuit split here dates back to the Seventh Circuit's decision in *Sunbeam*, before the First Circuit's decision below it might have been possible to argue that the Fourth Circuit's reasoning in *Lubrizol* had been discredited and would not be adopted by future courts. Indeed, respondents argued just that in opposing certiorari in *Sunbeam*. *See* Opp. 1, No. 12-431 (U.S. Nov. 9, 2012). That argument is no longer valid. By endorsing *Lubrizol*, the First Circuit has perpetuated and entrenched the open conflict among the circuits.

Indeed, lower courts facing this issue have highlighted the "unsettled area of rejection of trademark licenses," recognizing that regardless of the circuit court with which they align, "further litigation" of their decision is "certain to follow," and could delay resolution of the bankruptcy case "for years." *E.g.*, *In re Rent-A-Wreck of Am., Inc.*, 580 B.R. 364, 387 & n.156 (Bankr. D. Del. 2018). Establishing a clear rule and enabling parties to avoid such prolonged litigation, with its potential to derail reorganization proceedings, is critical.

II. The Court Should Grant Review Of The Question Whether An Exclusive Right To Sell Patented Products Is A "Right To Intellectual Property" Under §365(n)

The First Circuit compounded its error regarding the effect of rejection on rights not expressly protected by §365(n) by adopting an exceedingly narrow construction of the "right[s] to intellectual property" covered by that provision. On the First Circuit's reading, §365(n) no longer protects one of the most important intellectual property rights a licensee can be granted—the exclusive right to sell a patented invention in a

particular field of use or territory. The Court should grant review of this question as well, so that it can effectively address both of the First Circuit's related misinterpretations of §365 and the broad threat that, taken together, they pose to intellectual property licensees' rights.

A. The First Circuit's Decision Conflicts With The Statute's Plain Text And Basic Principles Of Patent Law

The First Circuit recognized that §365(n) "protects ... an exclusive license to use a patent." App. 13a. But it concluded—without any analysis of the relevant text—that "the right to sell a [patented] product is clearly not included within the statute's definition of intellectual property." App. 15a. It also opined—again, without any support—that Mission's exclusive right to distribute products practicing the patent within the United States could not be a right to intellectual property because Mission's license was limited to a particular field of use. *Id.* That reasoning contravenes the statute's language and reveals a fundamental misunderstanding of patent licensing.

1. The plain text of the Bankruptcy Code and the Patent Act makes clear that a right to sell a patented invention is a "right to intellectual property" under §365(n)(1).

Section 365(n) permits a licensee to whom the debtor has licensed "a right to intellectual property" to "retain its rights (including a right to enforce any exclusivity provision of such contract ...) under such contract ... to such intellectual property." §365(n)(1)(B). The Bankruptcy Code, in turn, defines "intellectual property" to include any "invention, process [or] design

... protected under title 35" (the Patent Act). §101(35A)(B). And one of the key attributes of a patent under the Patent Act is the right to sell the patented invention and exclude others from doing so. 35 U.S.C. §154(a)(1) ("Every patent shall ... grant to the patentee ... the right to exclude others from making, using, offering for sale, or *selling* the invention throughout the United States." (emphasis added)); *id.* §271(a) ("[W]hoever without authority makes, uses, offers to sell, or *sells* any patented invention ... infringes the patent." (emphasis added)).

Because the patentee has the right to exclude others from selling its invention, any grant of rights to another party to sell that invention is necessarily a grant of rights to the invention—i.e., "a right to intellectual property" within the meaning of §365(n). The First Circuit's apparent conclusion that the right to *use* a patented invention is "a right to intellectual property" within the meaning of §365(n), but that the right to *sell* the invention is not, thus contravenes the clear language of the statute.

Courts—including this Court—have long recognized that the right to sell a patented invention is a patent license. *See, e.g., De Forest Radio Tel. Co.* v. *United States*, 273 U.S. 236, 241 (1927) ("Any language used by the owner of the patent ... from which [another] may properly infer that the owner consents to his use of the patent in making or using it, *or selling it*, upon which the other acts, constitutes a license." (emphasis added)); *Ethyl Gasoline Corp.* v. *United States*, 309 U.S. 436, 456 (1940) (a patentee "may grant licenses to make, use *or vend*" a patented invention (emphasis added)).

Courts that have addressed the question in the §365(n) context have agreed. *See In re Davidson Hydrant Techs. Inc.*, 2012 WL 987620, at *5 (Bankr. N.D. Ga. Jan. 10, 2012) ("the right to offer for sale a patented product is ... a 'stick' in the bundle of [patent] rights" protected under §365(n)); *In re Spansion, Inc.*, 2011 WL 3268084, at *9 (D. Del. July 28, 2011) (the "ability to sell products that contained" patented technology is a "patent license" that can be retained pursuant to §365(n)), *aff'd*, 507 Fed. App'x 125 (3d Cir. 2012); *SIMA*, 2018 WL 2293705, at *2, *10 (a promise not to "enter into any agreement with any other person for ... selling a 'competing product'" "embodies precisely the kind of exclusive intellectual property rights that are protected by" §365(n)).

Intellectual property scholars agree, explaining that the "right[] to ... sell" a patented product is "severally licensable," just "as the rights to make [or] use" a patented product are independently licensable. *See* Milgrim & Bensen, *Milgrim on Licensing* §2.33. Congress, too, recognized this basic point when enacting §365(n), explaining that, because technological development and innovation proceed by "an expensive and risky series of steps including research, development, manufacturing, *and marketing*," licenses may be necessary to facilitate each step. S. Rep. No. 100-505, at 3202 (emphasis added). The First Circuit's contrary conclusion has no support and makes no sense.

2. The First Circuit also believed that Mission's exclusive right to sell certain products practicing Tempnology's patents in the United States was not an exclusive "right to intellectual property" because Mission had that right only as to specific products, not all such products. App. 15a. "An exclusive right to sell a product," the court reasoned, "is not equivalent to

an exclusive right to exploit the product's underlying intellectual property." *Id.*

While that is true, it misses the point entirely. A licensee need not have an exclusive right to practice a patent in *all* of its applications in order to have an exclusive right to practice a patent in *some* of its applications. That is precisely what Mission had: an exclusive right to sell products practicing the patents Tempnology had licensed to it within a specific field of use and geographic area. That is a "right to intellectual property" covered by §365(n)(1)(B), which expressly protects "a right to enforce any exclusivity provision" of a license agreement.

Indeed, the very purpose of licensing intellectual property—rather than simply assigning or selling it—is to convey some, but not all, of the rights to the intellectual property to the licensee and retain some of the rights for the licensor or other potential licensees. Accordingly, licenses that grant the exclusive right to practice a patent within a particular field of use are a well-recognized and very common type of intellectual property right. *See* Dratler & McJohn, *Licensing of Intellectual Property* §7.04 ("[F]ield-of-use restraints are among the most common restrictive practices in licensing" and "may be one of the most important practical methods of maximizing revenue from broadly applicable technology."); Nimmer & Dodd, *Modern Licensing Law* §14:36 ("[F]ield-of-use restriction[s]"—which "give[] the licensee rights to use the technology ... in reference to a particular application"—are "routine[]" and "frequently coupled with other restrictions, such as geographic or other limitations."); Milgrim & Bensen, *Milgrim on Licensing* §15.12 (explaining that field-of-use restrictions allow licensors to "maximiz[e] [their] ultimate revenues" because licensees often have

unique "strengths" in "different fields" and further noting that, in light of their "economic value," field-of-use licensees regularly "seek" exclusivity provisions).

Congress thus properly recognized the ubiquity and importance of licenses for a particular field of use, and made clear that such licenses would be protected, when enacting §365(n). *See* S. Rep. No. 100-505, at 3202 (noting that licensing "provides a mechanism" for an inventor to seek "[separate] partners for each field of use" of his invention); *id.* ("The licensee ... frequently is interested in the intellectual property for a specific application or geographic market"). Section 365(n) was "intended to protect and to facilitate" field-of-use licenses along with other types of licenses important to "technological development and innovation." *Id.*

B. The First Circuit's Interpretation Eviscerates §365(n)'s Protections For Licensees

The First Circuit's reading of §365(n) dramatically narrows its scope and thwarts Congress's aim in adopting the provision. By enacting §365(n), Congress meant to protect all of an intellectual property licensee's rights, including the exclusive right to sell specific products practicing a patent. Accordingly, it "broadly define[d] 'intellectual property' to include virtually all types of such rights (other than trademarks and similar rights)," and explained that "[t]he definition is broad and is to be interpreted liberally to carry out the intent of Congress to remove the cloud cast by that recent interpretation of the Bankruptcy Code [in *Lubrizol*] upon the intellectual property licensing system." S. Rep. No. 100-505, at 3204-3205.

And, as noted, Congress explicitly protected intellectual property licensees' exclusivity rights, recognizing that exclusivity is frequently a key provision of a license agreement. *See* §365(n)(1)(B) (upon rejection, the licensee may "retain its rights (including a right to enforce any exclusivity provision ...)"); S. Rep. No. 100-505, at 3206 (If a licensing "contract granted exclusive use to the licensee, such exclusivity would be preserved."); *id.* at 3207 (§365(n) protects the "exclusive rights" of licensees by barring the debtor from "sell[ing] those rights through rejection.").

Congress recognized that terminating a licensee's rights upon rejection "leaves licensees in a precarious position and thus threaten[s] the very flexible and beneficial system of intellectual property licensing which has developed in the United States," by forcing "parties who would have formerly accepted licenses ... to demand assignment—outright transfer of ownership of the intellectual property." S. Rep. No. 100-505, at 3201-3202. Congress viewed this development as "a fundamental threat to the creative process that has nurtured innovation in the United States." *Id.* Indeed, it was "resulting in undercompensation of U.S. inventors," as licensees paid less for rights that were uncertain. *Id.* at 3203.

The ability to grant a licensee the right to sell products practicing a patent within a particular field of use—and to exclude others from doing so—is a critical aspect of the licensing system Congress was attempting to protect. In fact, as commentators have observed in discussing this case, "in many instances a license to intellectual property would be rendered worthless without the accompanying distribution rights." Vasser & Harmeyer, *The Fate of Distribution Rights After Bankruptcy*, Law360 (Jan. 12, 2017).

The First Circuit's decision puts those rights once again at risk, contravening the text and purpose of §365(n) and essentially restoring the rule of *Lubrizol* for an important class of intellectual property rights. It thus creates new uncertainty for a large group of licensees and licensors, precisely where Congress intended to provide certainty. This Court should grant review and dispel that unnecessary and harmful confusion.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 2018

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FIRST CIRCUIT

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879 F.3d 389
No. 16-9016

IN RE TEMPNOLOGY, LLC, N/K/A OLD COLD LLC,
Debtor,

MISSION PRODUCT HOLDINGS, INC.,
Appellant,

v.

TEMPNOLOGY, LLC, N/K/A OLD COLD LLC,
Appellee.

January 12, 2018

Before Torruella, Lynch, and Kayatta, Circuit Judges.

OPINION

KAYATTA, Circuit Judge.

Generally speaking, when a company files for protection under Chapter 11 of the Bankruptcy Code, the trustee or the debtor-in-possession may secure court approval to "reject" any executory contract of the debtor, meaning that the other party to the contract is left with a damages claim for breach, but not the ability to compel further performance. 11 U.S.C. §§ 365(a),

1107(a); *see NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 531–32, 104 S.Ct. 1188, 79 L.Ed.2d 482 (1984); *Mason v. Official Comm. of Unsecured Creditors, for FBI Distrib. Corp. & FBC Distrib. Corp.* (*In re FBI Distrib. Corp.*), 330 F.3d 36, 43–44 (1st Cir. 2003). When the rejected contract, however, is one "under which the debtor is a licensor of a right to intellectual property," the licensee may elect to "retain its rights ... to such intellectual property," thereby continuing the debtor's duty to license the intellectual property. 11 U.S.C. § 365(n)(1). In this case, Tempnology, LLC ("Debtor")—a debtor-in-possession seeking to reorganize under Chapter 11—rejected an agreement giving certain marketing and distribution rights to Mission Product Holdings, Inc. The parties agree that Mission can insist that the rejection not apply to nonexclusive patent licenses contained in the rejected agreement. They disagree as to whether the rejection applies to the agreement's grants of a trademark license and of exclusive rights to sell certain of Debtor's goods. In the case of the trademark license, resolving that disagreement poses for this circuit an issue of first impression concerning which other circuits are split. For the following reasons, we agree with the bankruptcy court that the rejection left Mission with only a pre-petition damages claim in lieu of any obligation by Debtor to further perform under either the trademark license or the grant of exclusive distribution rights.

I.

Debtor made specialized products—such as towels, socks, headbands, and other accessories—designed to remain at low temperatures even when used during exercise, which it marketed under the "Coolcore" and "Dr. Cool" brands. A significant intellectual property

portfolio supported Debtor's products. This portfolio consisted of two issued patents, four pending patents, research studies, and a multitude of registered and pending trademarks.

On November 21, 2012, Mission and Debtor executed a Co-Marketing and Distribution Agreement, which serves as the focal point of this appeal. The Agreement provided Mission with three relevant categories of rights.

First, Debtor granted Mission distribution rights to certain of its manufactured products within the United States.[1] These products, called "Cooling Accessories," were defined in the Agreement as "products of the specific types listed on Exhibit A" and "manufactured by or on behalf of [Debtor]." They also included "additional products that are hereafter developed by [Debtor]." Exhibit A broke down the thirteen listed products into two categories: "Exclusive" and "Non-Exclusive" Cooling Accessories. For "Exclusive Cooling Accessories"—comprised of towels, wraps, hoodies, bandanas, multi-chills, and doo rags—Debtor agreed that "it will not license or sell" the products "to anyone other than [Mission] during the Term." Mission's rights with respect to the remaining Cooling Accessories—comprised of socks, headbands, wristbands, sleeves, skullcaps, yoga mats, and baselayers—were nonexclusive because Debtor reserved for itself the "right to sell ... to vertically integrated companies as well as customers that are not Sports Distributors or retailers in the Sporting Channel."

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[1] In addition to the United States, the exclusive geographic territory also included "other countries and territories that [Mission] acquires exclusive distribution rights to pursuant to its first rights of refusal and notice."

Second, Debtor granted Mission a nonexclusive license to Debtor's intellectual property. This "nonexclusive, irrevocable, royalty-free, fully paid-up, perpetual, worldwide, fully-transferable license" granted Mission the right "to sublicense (through multiple tiers), use, reproduce, modify, and create derivative work based on and otherwise freely exploit" Debtor's products—including Cooling Accessories—and its intellectual property. This irrevocable license, however, expressly excluded any rights to Debtor's trademarks.

Trademarks were the subject of the third bucket of rights. Section 15(d) of the Agreement granted Mission a "nonexclusive, non-transferable, limited license" for the term of the Agreement "to use [Debtor's] trademark and logo (as well as any other Marks licensed hereunder) for the limited purpose of performing its obligations hereunder, exercising its rights and promoting the purposes of this Agreement." This license came with limitations. Mission was forbidden from using the trademarks in a manner that was disparaging, inaccurate, or otherwise inconsistent with the terms of the Agreement. Further, Mission was required to "comply with any written trademark guidelines" and Debtor had "the right to review and approve all uses of its Marks," except for certain pre-approved uses.

The Agreement also included a provision permitting either party to terminate the Agreement without cause. On June 30, 2014, Mission exercised this option, triggering a "Wind-Down Period" of approximately two years. Debtor, in turn, issued a notice of immediate termination for cause on July 22, 2014, claiming that Mission's hiring of Debtor's former president violated the Agreement's restrictive covenants. Pursuant to the Agreement's terms, Mission's challenge to Debtor's immediate termination for cause went before an arbi-

trator. The arbitrator determined that Debtor had waived any grounds for immediate termination under the restrictive covenant and that the Agreement remained in effect until the expiration of the Wind-Down Period. That ruling meant that Mission was contractually entitled to retain its distribution and trademark rights until July 1, 2016, and its nonexclusive intellectual property rights in perpetuity.

Intervening events, however, put an earlier end to the parties' contractual relationship. Although Debtor posted profits in 2012, its financial outlook dimmed. After accruing multi-million dollar net operating losses in 2013 and 2014, Debtor filed a voluntary petition for Chapter 11 bankruptcy on September 1, 2015. The following day, Debtor moved to reject seventeen of its contracts, including the Agreement, pursuant to 11 U.S.C. § 365(a).

Section 365(a) permits a debtor-in-possession,[2] with the court's approval, to "reject any executory contract" that, in the debtor's business judgment, is not beneficial to the company. *See Agarwal v. Pomona Valley Med. Grp., Inc.* (*In re Pomona Valley Med. Grp., Inc.*), 476 F.3d 665, 669–71 (9th Cir. 2007); *see also Bildisco & Bildisco*, 465 U.S. at 520, 523, 104 S.Ct. 1188. In its memoranda supporting its motion, Debtor informed the bankruptcy court that it sought to reject the Agreement because it hindered Debtor's ability to derive revenue from other marketing and distribution oppor-

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[2] Although this provision of the statute only refers to the powers of a trustee, per 11 U.S.C. § 1107(a), a Chapter 11 "debtor in possession shall have all the rights ... and powers, and shall perform all the functions and duties, ... of a trustee serving in a case under this chapter." *See also In re FBI Distrib. Corp.*, 330 F.3d at 42 n.8 (citing this provision).

tunities. Debtor faulted Mission—and particularly the Agreement's grant of exclusive distribution rights—for its bankruptcy. It alleged that the Agreement "suffocated the Debtor's ability to market and distribute its products" after Mission failed to fulfill its obligations, "essentially starving the Debtor from any income."

Mission objected to the rejection motion, arguing that 11 U.S.C. § 365(n) allowed Mission to retain both its intellectual property license and its exclusive distribution rights. Section 365(n) provides an exception from section 365(a)'s broad rejection authority by limiting the debtor-in-possession's ability to terminate intellectual property licenses it has granted to other parties.

On September 21, 2015, the bankruptcy court granted Debtor's motion to reject certain executory contracts, except for the Agreement, for which it ordered further hearing. In a subsequent one-sentence order, the bankruptcy court granted the motion to reject the Agreement, "subject to Mission Product Holdings's election to preserve its rights under 11 U.S.C. § 365(n)." Debtor then moved for a determination of the applicability and scope of Mission's rights under section 365(n). In that motion, Debtor conceded that Mission retained its nonexclusive, perpetual license to certain of Debtor's intellectual properties—which did not include its trademarks—but argued that section 365(n) did not cover either Mission's exclusive distribution rights or the trademark license. Mission again objected, arguing that the relief Debtor requested required an adversary proceeding pursuant to Rule 7001(2) of the Federal Rules of Bankruptcy Procedure.

After holding a nontestimonial hearing, the bankruptcy court concluded that Mission's election pursuant to section 365(n) did not preserve either the exclusive

distribution rights or the trademark license. The court found that section 365(n) only protected intellectual property rights, and Mission's exclusive distributorship could not fairly be characterized as such. With respect to trademarks, the court reasoned that Congress's decision to leave trademarks off the definitional list of intellectual properties in 11 U.S.C. § 101(35A) left the trademark license unprotected from rejection. Finally, the court rejected Mission's argument that the Bankruptcy Code required an adversary proceeding to determine the issue. The court viewed "the Motion in the context of rejection under § 365, which is a contested matter under Fed. R. Bankr. P. 9014."

Mission appealed to the Bankruptcy Appellate Panel for the First Circuit ("BAP"). The BAP affirmed the bankruptcy court's order with respect to Mission's exclusive distribution rights, concluding that "Mission's attempt to re-characterize its exclusive product distribution rights under the Agreement as an intellectual property license [is] unsupported by either the letter or the spirit of the Agreement." Like the bankruptcy court, the BAP read section 365(n)'s protection of "exclusivity provision[s]" as encompassing only the exclusivity attributes, such as they might be, of intellectual property rights. The BAP also affirmed the bankruptcy court's determination that the section 365(n) motion did not require Debtor to commence an adversary proceeding under Bankruptcy Rule 7001.

Regarding trademarks, however, the BAP diverged from the bankruptcy court. Although the BAP agreed that section 365(n) failed to protect Mission's rights to Debtor's trademarks, it disagreed as to the effect of that conclusion. Rather than finding that rejection extinguished the non-debtor's rights, the BAP followed the Seventh Circuit's ruling in *Sunbeam*

Products, Inc. v. Chicago American Manufacturing, LLC, 686 F.3d 372 (7th Cir. 2012). The BAP held that, because section 365(g) deems the effect of rejection to be a breach of contract, and a licensor's breach of a trademark agreement outside the bankruptcy context does not necessarily terminate the licensee's rights, rejection under section 365(g) likewise does not necessarily eliminate those rights. Thus, the BAP reversed the bankruptcy court's determination that Mission no longer had protectable rights in Debtor's trademarks and trade names.

This appeal ensued. We affirm the bankruptcy court's determinations. We conclude that section 365(n) does not apply to Mission's right to be the exclusive distributor of Debtor's products, or to its trademark license. Unlike the BAP and the Seventh Circuit, we also hold that Mission's right to use Debtor's trademarks did not otherwise survive rejection of the Agreement.

II.

On appeal from a decision by the BAP, "[w]e accord no special deference to determinations made by the [BAP]," and instead "train the lens of our inquiry directly on the bankruptcy court's decision."[3] *Wheeling & Lake Erie Ry. Co. v. Keach* (*In re Montreal, Maine & Atl. Ry., Ltd.*), 799 F.3d 1, 5 (1st Cir. 2015). In doing so,

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[3] We do nevertheless pay great attention to the considered opinion of the three experienced bankruptcy judges who sit on the BAP. Among other things, our consideration of such an opinion reduces the likelihood that our court of general appellate jurisdiction is blindsided by the effect that a decision might have on matters or issues of bankruptcy law and practice that are beyond the ken of the parties in a particular proceeding.

we review the bankruptcy court's factual findings for clear error and its conclusions of law de novo. *DeGiacomo v. Traverse* (*In re Traverse*), 753 F.3d 19, 24 (1st Cir. 2014).

III.

We begin with the statutory framework that defines the scope of Debtor's ability, "subject to the court's approval," to "assume or reject any executory contract or unexpired lease of the debtor." 11 U.S.C. § 365(a). Executory contracts, although not defined in the Bankruptcy Code, are generally considered to be contracts "on which performance is due to some extent on both sides." *In re FBI Distrib. Corp.*, 330 F.3d at 40 n.5 (quoting *Bildisco & Bildisco*, 465 U.S. at 522 n.6, 104 S.Ct. 1188); *see also Parkview Adventist Med. Ctr. v. United States ex rel. Dep't of Health & Human Servs.*, 842 F.3d 757, 763 n.12 (1st Cir. 2016). Section 365(a) permits the debtor-in-possession to assume those contracts that are beneficial and reject those that may hinder its recovery. *In re FBI Distrib. Corp.*, 330 F.3d at 42. It provides an "elixir for use in nursing a business back to good health" by allowing the trustee or debtor-in-possession to "prescribe it as an emetic to purge the bankruptcy estate of obligations that promise to hinder a reorganization." *Thinking Machs. Corp. v. Mellon Fin. Servs. Corp.* (*In re Thinking Machs. Corp.*), 67 F.3d 1021, 1024 (1st Cir. 1995). Section 365(a) thus furthers Chapter 11's "paramount objective" of rehabilitating debtors. *In re FBI Distrib. Corp.*, 330 F.3d at 41. In lieu of the rejected obligation, a debtor is left with a liability for what the Code deems to be a pre-petition breach of the contract. 11 U.S.C. § 365(g) ("[T]he rejection of an executory contract or unexpired lease of the debtor constitutes a breach of such contract

or lease ... immediately before the date of the filing of the petition....").

In 1985, the Fourth Circuit was tasked with applying this framework to an intellectual property license granted by a debtor. *See Lubrizol Enters., Inc. v. Richmond Metal Finishers, Inc.*, 756 F.2d 1043 (4th Cir. 1985). The Fourth Circuit held that the term "executory contract" in section 365(a) encompassed intellectual property licenses, *id.* at 1045, and that under section 365(g) the effect of rejection was to terminate an intellectual property license, *id.* at 1048. The court based its reasoning on what it saw as the animating principles behind section 365(g), thus distinguishing "statutory breach" from common law breach:

> Even though § 365(g) treats rejection as breach, the legislative history of § 365(g) makes clear that the purpose of the provision is to provide only a damages remedy for the non-bankrupt party.... [T]he statutory "breach" contemplated by § 365(g) controls, and provides only a money damages remedy for the non-bankrupt party. ... Allowing specific performance would obviously undercut the core purpose of rejection under § 365(a).

Id.

Three years later, Congress responded. Rather than amending either section 365(a) or section 365(g), Congress enacted a brand new section 365(n). *See* S. Rep. No. 100-505, at 8 (1988). Section 365(n)(1) gives to a licensee of intellectual property rights a choice between treating the license as terminated and asserting a claim for pre-petition damages—a remedy the licensee held already under section 365(g)—or retaining its

intellectual property rights under the license. It states, in full:

> If the trustee rejects an executory contract under which the debtor is a licensor of a right to intellectual property, the licensee under such contract may elect—
>
> (A) to treat such contract as terminated by such rejection if such rejection by the trustee amounts to such a breach as would entitle the licensee to treat such contract as terminated by virtue of its own terms, applicable nonbankruptcy law, or an agreement made by the licensee with another entity; or
>
> (B) to retain its rights (including a right to enforce any exclusivity provision of such contract, but excluding any other right under applicable nonbankruptcy law to specific performance of such contract) under such contract and under any agreement supplementary to such contract, to such intellectual property (including any embodiment of such intellectual property to the extent protected by applicable nonbankruptcy law), as such rights existed immediately before the case commenced, for—
>
> (i) the duration of such contract; and
>
> (ii) any period for which such contract may be extended by the licensee as of right under applicable nonbankruptcy law.

11 U.S.C. § 365(n)(1).

Congress also amended the definition of intellectual property, thus defining the scope of the new section 365(n)(1). Under 11 U.S.C. § 101(35A),

> The term "intellectual property" means—
>
> (A) trade secret;
>
> (B) invention, process, design, or plant protected under title 35;
>
> (C) patent application;
>
> (D) plant variety;
>
> (E) work of authorship protected under title 17; or
>
> (F) mask work protected under chapter 9 of title 17;
>
> to the extent protected by applicable nonbankruptcy law.

IV.

With the foregoing framework in mind, we turn now to Mission's arguments on appeal. We consider first its contention that its exclusive distribution rights remained unaffected by Debtor's rejection of the Agreement. We then address Mission's contention that its trademark license also remained in effect during the two-year Wind-Down Period. What is at issue for these parties, practically speaking, is whether to classify as prepetition or post-petition liability any damages caused by Debtor's failure to honor its executory obligations during the two-year Wind-Down Period.

A.

Section 365(n)(1)(B) allows Mission "to retain its rights (including a right to enforce any exclusivity pro-

vision of such contract ...) under such contract and under any agreement supplementary to such contract, to such intellectual property (including any embodiment of such intellectual property to the extent protected by applicable nonbankruptcy law)." Mission would have us read the words "any exclusivity provision of such contract" in the foregoing parenthetical as meaning any "exclusivity provision" in the entire contract (or any supplementary agreement), whether or not the provision grants exclusive use of a pertinent intellectual property right.

We disagree. We start in section 365(a) with the universe of all executory contracts that a debtor may seek to reject; section 365(n)(1) then focuses on a subset of that universe ("executory contract[s] under which the debtor is a licensor of a right to intellectual property"); subsection (n)(1)(B) then says what happens to intellectual property rights granted under such contracts (the licensee may "retain its rights"); and the parenthetical merely makes clear that those rights "to such intellectual property" include any exclusivity attributes of those rights. In this manner, subsection (n)(1)(B) protects, for example, an exclusive license to use a patent, but does not protect an exclusive right to sell a product merely because that right appears in a contract that also contains a license to use intellectual property.

Our reading aligns with the legislative record. In enacting section 365(n), Congress made clear that it was responding to a "particular problem arising out of recent court decisions." S. Rep. No. 100-505, at 5. The limited "purpose of the bill is to amend Section 365 of the Bankruptcy Code to make clear that the rights of an intellectual property licensee to use the licensed property cannot be unilaterally cut off." *Id.* at 1. The amendment is "not in any way intended to address

broader matters under Section 365." *Id.* at 5. Congress, it seems, was focused on a narrow issue, and only intended its amendment to address that issue. It did not intend the scope of its amendment to extend beyond the licensee's bargained-for intellectual property rights post-rejection, as Mission's position would necessarily require. Further supporting our reading of the statutory text, Congress's description of the protected exclusivity rights in both relevant congressional reports is limited to license rights, and does not mention or imply the protection of exclusive rights other than those to intellectual property. The House Report, describing the House's version of the bill,[4] states that, "[u]nder the legislation, any right in the license agreement giving the licensee an exclusive license will still be enforceable by the licensee, but other rights of the licensee cannot be specifically enforced." H.R. Rep. No. 100-1012, at 6 (1988). Similarly, the Senate Report says that "if the contract granted exclusive use to the licensee, such exclusivity would be preserved to the license." S. Rep. No. 100-505, at 9.

Mission's fallback position is to argue that, in this instance, its exclusive distribution right is, de facto, a provision that renders its right to use Debtor's intellectual property exclusive. The unstated premise is that because Mission has an exclusive right to sell certain of Debtor's products made using Debtor's intellectual property, no one else can use the intellectual property. Hence, Mission reasons, the exclusive distribution right is an "exclusivity provision" of the intellectual property right.

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[4] Congress ultimately adopted the Senate version, although the language of this section of the House bill is identical to its Senate counterpart.

The most obvious defect in this argument is its premise. The Agreement and record are clear that Debtor can use its intellectual property to make and sell products other than those for which the Agreement grants Mission exclusive distribution rights. The only thing that is exclusive is the right to sell certain products, not the right to practice, for example, the patent that is used to make those products. An exclusive right to sell a product is not equivalent to an exclusive right to exploit the product's underlying intellectual property.

But, argues Mission, because of its exclusive distribution rights, no one can use the Debtor's patent to make at least some products if those products are to be sold in Mission's territory. Perhaps. But this is simply a restriction on the right to sell certain products that, like many products, happen to be made using a patent. And the exclusivity Mission seeks to maintain would apply fully even if there were no patent license at all. Given that the right to sell a product is clearly not included within the statute's definition of intellectual property, we are not going to treat it as such merely because of a coincidental practical effect it may have in limiting the scope of the manner in which a patent might be exploited, especially where the Agreement itself expressly makes clear that any patent license is nonexclusive. To hold otherwise would be to find buried in a parenthetical to a statutory subsection an implied exception to rejection that would, in practical terms, likely cover as much commercial territory as do some of the rights expressly defined as protected. *See Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 468, 121 S.Ct. 903, 149 L.Ed.2d 1 (2001) ("Congress ... does not, one might say, hide elephants in mouseholes."). The fact that Mission can cite no circuit court precedent for

its effort to paint its exclusive distribution right as a de facto exclusive intellectual property right further buttresses our conclusion.[5]

Mission also argues that its nonexclusive license of intellectual property "lacks meaningful value" unless it retains an exclusive right to sell certain of Debtor's products. Why this is so is not apparent given that section 365(n) protects the nonexclusive license, hence Mission retained the right to use the intellectual property. The Agreement itself spells out myriad ways that Mission could exploit its nonexclusive intellectual property rights that were presumably unaffected by rejection of its exclusive distribution right: Mission could still "sublicense (through multiple tiers), use, reproduce, modify, and create derivative work based on" Debtor's intellectual property. And if those rights lacked meaningful value, that hardly becomes a reason for turning rights that are not intellectual property rights into intellectual property rights. Rather, it simply suggests that most of the contract's value was apparently in the exclusive distribution agreement.

Nor does the reference in section 365(n)(1)(B) to "any embodiment of such intellectual property" help Mission. Embodiment is a term of art associated with intellectual property. The Senate Report includes a letter informing the Judiciary Committee of the Department of Commerce's view of the bill, which states that "[a]lthough 'embodiment' is not defined, we assume the term arises from the copyright law." S. Rep.

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[5] Mission cites *Encino Bus. Mgmt., Inc. v. Prize Frize, Inc.* (*In re Prize Frize, Inc.*), 32 F.3d 426 (9th Cir. 1994), but the contract in that case granted an "exclusive license to utilize the proprietary rights." *Id.* at 427. This case is clearly distinguishable, as Mission was granted no such right.

No. 100-505, at 12. Black's Law Dictionary tags the term as belonging to patent law, and offers three alternate definitions: (1) "[t]he tangible manifestation of an invention"; (2) "[t]he method for using this tangible form"; or (3) "[t]he part of a patent application or patent that describes a concrete manifestation of the invention." *Embodiment*, *Black's Law Dictionary* (10th ed. 2014). Black's Law Dictionary further notes that while intellectual property "is a mental construct" without "physical structure," an embodiment "is a specific physical form of the invention" and thus "[e]ach embodiment exists in the real world." *Id.* (quoting Morgan D. Rosenberg, *The Essentials of Patent Claim Drafting* xvii (2012)).

Where the statutory language includes a term of art, resort to sources beyond the text is particularly appropriate to make clear the intended meaning of that term. *See Molzof v. United States*, 502 U.S. 301, 307, 112 S.Ct. 711, 116 L.Ed.2d 731 (1992). Both the Senate Report and the Department of Commerce letter offer additional insight into the meaning of "embodiment" and its application to a licensee's rights. The Senate Report provides three examples of protected rights, and concludes with two traits that all protected rights must contain:

> [T]he parties might have agreed that the licensor would prepare a prototype incorporating the licensed intellectual property. If such a prototype was prepared prior to the filing of the petition for relief, but had not been delivered to the licensee at that time, then the licensee can compel the delivery of the prototype in accordance with the terms of the rejected license. Other examples of embodiments include genetic material needed to produce certain bio-

> technological products and computer program source codes. There are many other possible examples of embodiments, *but critical to any right of the licensee to obtain such embodiments under this bill is the prepetition agreement of the parties that the licensee have access to such material and the physical existence of such material on the day of the bankruptcy filing.*

S. Rep. No. 100-505, at 9-10 (emphasis added). The Department of Commerce letter states:

> Where the licensed intellectual property is not a work of authorship, we assume the term "embodiment" would be interpreted in a similar sense of enablement in a manner reasonable in the circumstances and would not necessarily include all physical manifestations of the intellectual property. For example, an embodiment of a licensed process might be interpreted to include technical data sufficient to enable the licensee to operate the process, but not a manufacturing facility using (or embodying) the process; and *an embodiment of a licensed invention might be interpreted to include a sample of the invention, but not all inventory.*

S. Rep. No. 100-505, at 12 (emphasis added).

A few common themes appear in these explanations. First, the pre-petition agreement must give the licensee access to the embodiment of intellectual property. Second, an embodiment of intellectual property is a tangible or physical object that exists pre-petition. Third, an embodiment of intellectual property is something inherently limited in number—it is a prototype or example of a product, but does not include all products

produced using the intellectual property. Finally, we can infer that the purpose of this provision is to allow the licensee to exploit its right to the underlying intellectual property.

Here, we have no object to which Mission requires access in order to exploit an intellectual property right. Rather, we have a prosaic, nonexclusive right to use a patented process, and an unremarkable and entirely independent right to be the exclusive distributor of some but not all goods made with that process. There is simply no "embodiment" at issue in the relevant statutory sense.

Nor does this case, as Mission contends, bear on the enforceability of all negative covenants independent of an intellectual property license. If a party possesses an intellectual property license, perhaps the Code may protect from rejection certain negative covenants—such as confidentiality—that do not materially restrict the debtor's reorganization, are tied closely to the intellectual property license, and are necessary to implement its terms. *See Biosafe Int'l, Inc. v. Controlled Shredders, Inc.* (*In re Szombathy*), Nos. 94 B 15536, 95 A 01035, 1996 WL 417121, at *11 (Bankr. N.D. Ill. July 9, 1996) *rev'd in part sub nom. Szombathy v. Controlled Shredders, Inc.*, Nos. 94 B 15536, 95 A 01035, 1997 WL 189314 (N.D. Ill. Apr. 14, 1997). But we are not presented with that situation here.

Finally, we observe that Mission salts its brief with several undeveloped suggestions that rejection under section 365(a), even if allowed, might not extinguish a right to demand specific performance of the negative covenant implicit in the exclusive distribution rights. Mission attempts to support these suggestions by citing *In re Szombathy*, 1996 WL 417121, and by emphasizing

that case's reliance on a quote from the Department of Commerce's letter to the Senate Judiciary Committee. Neither source seems to come close to carrying the meaning claimed by Mission. In any event, even as Mission tendered an analogous argument in connection with its trademark license (which we address, below), it never raised any such argument in the bankruptcy court as a basis for preserving its exclusive distribution rights. Hence, the argument is waived in this civil action. *See Argentaria v. Wiscovitch-Rentas* (*In re Net-Velázquez*), 625 F.3d 34, 40 (1st Cir. 2010) ("The proposition is well established that, 'absent the most extraordinary circumstances, legal theories not raised squarely in the lower court cannot be broached for the first time on appeal.' " (quoting *Teamsters, Chauffeurs, Warehousemen & Helpers Union, Local No. 59 v. Superline Transp. Co.*, 953 F.2d 17, 21 (1st Cir. 1992))).

B.

We next consider whether Mission retained its rights to use Debtor's trademarks post-rejection. In defining the intellectual property eligible for the protection of section 365(n), Congress expressly listed six kinds of intellectual property. 11 U.S.C. § 101(35A). Trademark licenses (hardly something one would forget about) are not listed, even though relatively obscure property such as "mask work protected under chapter 9 of title 17" is included. *Id.* Nor does the statute contain any catchall or residual clause from which one might infer the inclusion of properties beyond those expressly listed.

One might reasonably conclude that Congress's decision not to include trademark licenses within the protective ambit of section 365(n) must mean that such licenses are not exempt from section 365(a) rejection.

On the other hand, the conclusion that an agreement finds no haven from rejection in section 365(n) does not entirely exhaust the possible arguments for finding that a right under that agreement might otherwise survive rejection. For example, we have held that a counterparty's right to compel the return of its own property survives rejection of a contract under which the debtor has possession of that property. *See Abboud v. The Ground Round, Inc.* (*In re The Ground Round, Inc.*), 482 F.3d 15, 19 (1st Cir. 2007). This case, though, does not present us with a request by a party following rejection to recover its own property temporarily in the hands of the debtor. Rather, it presents a demand by a party to continue using the debtor's property.

Regarding trademarks specifically, the Senate Report states that Congress "postpone[d]" action on trademark licenses "to allow the development of equitable treatment of this situation by bankruptcy courts." S. Rep. No. 100-505, at 5. The only circuit to address this issue squarely has resisted the temptation to find in this ambiguous comment outside the statutory text a toehold for unfettered "equitable" dispensations from section 365(a) rejection when it would otherwise apply. *See Sunbeam*, 686 F.3d at 375 ("What the Bankruptcy Code provides, a judge cannot override by declaring that enforcement would be 'inequitable.' "). We agree. *See Law v. Siegel*, — U.S. ——, 134 S.Ct. 1188, 1194-95, 188 L.Ed.2d 146 (2014) ("We have long held that 'whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code." (quoting *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206, 108 S.Ct. 963, 99 L.Ed.2d 169 (1988))).

There is, though, an alternative argument for finding that a right to use a debtor's trademark continues

post-rejection. That argument rests not on equitable dispensation from rejection, but instead on an exploration of exactly what rejection means. The argument, as accepted by the Seventh Circuit in *Sunbeam*, runs thus: Under section 365(g), section 365(a) rejection constitutes a breach of contract that "frees the estate from the obligation to perform." *Sunbeam*, 686 F.3d at 377 (quoting *Thompkins v. Lil' Joe Records, Inc.*, 476 F.3d 1294, 1306 (11th Cir. 2007)). "But nothing about this process implies that any rights of the other contracting party have been vaporized." *Id.* Therefore, reasoned the Seventh Circuit, while rejection converts a debtor's duty to perform into a liability for pre-petition damages, it leaves in place the counterparty's right to continue using a trademark licensed to it under the rejected agreement. In so reasoning, the Seventh Circuit found itself unpersuaded by the contrary approach taken by the Fourth Circuit in *Lubrizol*. *Sunbeam*, 686 F.3d at 378; *see also In re Exide Techs.*, 607 F.3d 957, 964–68 (3d Cir. 2010) (Ambro, J., concurring).

Of course, to be precise, rejection as Congress viewed it does not "vaporize" a right. Rather, rejection converts the right into a pre-petition claim for damages. Putting that point of vocabulary to one side, and leaving open the possibility that courts may find some unwritten limitations on the full effects of section 365(a) rejection, we find trademark rights to provide a poor candidate for such dispensation. Congress's principal aim in providing for rejection was to "release the debtor's estate from burdensome obligations that can impede a successful reorganization." *Bildisco & Bildisco*, 465 U.S. at 528, 104 S.Ct. 1188. *Sunbeam* therefore largely rests on the unstated premise that it is possible to free a debtor from any continuing performance obligations under a trademark license even while preserv-

ing the licensee's right to use the trademark. *See Sunbeam*, 686 F.3d at 377. Judge Ambro's concurrence in *In re Exide Technologies* shares that premise. *See* 607 F.3d at 967 (Ambro, J., concurring) (assuming that the bankruptcy court could allow the licensee to retain trademark rights even while giving the debtor "a fresh start").

Careful examination undercuts that premise because the effective licensing of a trademark requires that the trademark owner—here Debtor, followed by any purchaser of its assets—monitor and exercise control over the quality of the goods sold to the public under cover of the trademark. *See* 3 J. Thomas *McCarthy, McCarthy on Trademarks & Unfair Competition* § 18:48 (5th ed. 2017) ("Thus, not only does the trademark owner have the right to control quality, when it licenses, it has the duty to control quality."). Trademarks, unlike patents, are public-facing messages to consumers about the relationship between the goods and the trademark owner. They signal uniform quality and also protect a business from competitors who attempt to profit from its developed goodwill. *See Societe Des Produits Nestle, S.A. v. Casa Helvetia*, Inc., 982 F.2d 633, 636 (1st Cir. 1992). The licensor's monitoring and control thus serve to ensure that the public is not deceived as to the nature or quality of the goods sold. Presumably, for this reason, the Agreement expressly reserves to Debtor the ability to exercise this control: The Agreement provides that Debtor "shall have the right to review and approve all uses of its Marks," except for certain pre-approved uses. Importantly, failure to monitor and exercise this control results in a so-called "naked license," jeopardizing the continued validity of the owner's own trademark rights. McCarthy, *supra*, § 18:48; *see also Eva's Bridal Ltd. v. Halanick*

Enters., Inc., 639 F.3d 788, 790 (7th Cir. 2011) ("[A] naked license abandons a mark."); Restatement (Third) of Unfair Competition § 33 ("The owner of a trademark, trade name, collective mark, or certification mark may license another to use the designation. ... Failure of the licensor to exercise reasonable control over the use of the designation by the licensee can result in abandonment....").

The Seventh Circuit's approach, therefore, would allow Mission to retain the use of Debtor's trademarks in a manner that would force Debtor to choose between performing executory obligations arising from the continuance of the license or risking the permanent loss of its trademarks, thereby diminishing their value to Debtor, whether realized directly or through an asset sale. Such a restriction on Debtor's ability to free itself from its executory obligations, even if limited to trademark licenses alone, would depart from the manner in which section 365(a) otherwise operates. And the logic behind that approach (no rights of the counterparty should be "vaporized" in favor of a damages claim) would seem to invite further leakage. If trademark rights categorically survive rejection, then why not exclusive distribution rights as well? Or a right to receive advance notice before termination of performance? And so on.

Although claiming to follow *Sunbeam*, our dissenting colleague seems to reject its categorical approach in favor of what *Sunbeam* itself rejected—an "equitable remedy" that would consider in some unspecified manner the "terms of the Agreement, and non-bankruptcy law." *See Sunbeam*, 686 F.3d at 375-76. In so doing, our colleague gives great weight to a few lines in the Senate Report, treating them variously as "guidance," as a statement of Congress's "intent," and even as a

mandate that "instruct[s]" the courts. In short, the dissent's interpretative approach seems to accord a line in the Senate Report the force of a line in the statute itself. Moreover, it does so by taking a line out of the Senate Report addressing section 365(n), which itself has no relevant ambiguity, and then uses that line to inform the dissent's interpretation of the previously enacted section 365(a). And while it is true that the Senate Report references equitable consideration, the dissent also seems to overlook the fact that when Congress otherwise intended to grant bankruptcy courts the ability to "equitably" craft exceptions to the Code's rules, it did so in the statute itself. *See, e.g.*, 11 U.S.C. § 365(d)(5) (requiring the trustee to perform the obligations of the debtor until an unexpired lease is assumed or rejected "unless the court, after notice and a hearing and based on the equities of the case, orders otherwise"); *id.* § 552(b)(1) (stating that a security agreement may extend to proceeds or profits acquired after the commencement of the case "to the extent provided by such security agreement and by applicable nonbankruptcy law, except to any extent that the court, after notice and a hearing and based on the equities of the case, orders otherwise"); *see also id.* § 502(j) ("A reconsidered claim may be allowed or disallowed according to the equities of the case."); *id.* § 557(d)(2)(D) (allowing the expedited disposition of grain by, inter alia, "such other methods as is equitable in the case"); *id.* § 723(d) ("[T]he court, after notice and a hearing, shall determine an equitable distribution of the surplus so recovered...."); *id.* § 1113(c) (listing whether "the balance of the equities clearly favors rejection of such agreement" as a factor for a court to consider in determining whether to approve an application for rejection of a collective bargaining agreement); *id.* § 1114(g) (requiring a

court to modify the payment of retirement benefits if the court finds that "such modification is necessary to permit the reorganization of the debtor and assures that all creditors, the debtor, and all of the affected parties are treated fairly and equitably, and is clearly favored by the balance of the equities").

Even if we did sit in the chancellor's chair in applying section 365(a), we would likely hesitate to adopt our colleague's approach. Under such a case-specific, equitable approach, one might in theory preclude rejection only where the burden of quality assurance on the debtor will be minimal. The problem, though, is that in the bankruptcy context especially, where the licensor and licensee are at odds over continuing to deal with each other, the burden will likely often be greater than normal. Here, for example, the adversarial relationship between Debtor and Mission may portend less eager compliance. More importantly, in all cases there will be some burden, and it will usually not be possible to know at the time of the bankruptcy proceeding how great the burden will prove to be, as it will depend very much on the subsequent actions of the licensee. Conversely, the burden imposed on the counterparty of having its trademark right converted to a prepetition damages claim at a time when the relationship signaled by the trademark is itself ending will in most instances be less than the burden of having patent rights so converted. The counterparty may still make and sell its products—or any products—just so long as it avoids use of the trademark precisely when the message conveyed by the trademark may no longer be accurate. We therefore find unappealing the prospect of saddling bankruptcy proceedings with the added cost and delay of attempting to draw fact-sensitive and unreliable distinctions between greater and lesser burdens of this

type. *See RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 649, 132 S.Ct. 2065, 182 L.Ed.2d 967 (2012) ("[I]t is our obligation to interpret the Code clearly and predictably using well established principles of statutory construction."). There is, too, the public's interest in not being misled as to the origin and quantity of goods that consumers buy.

In sum, the approach taken by *Sunbeam* entirely ignores the residual enforcement burden it would impose on the debtor just as the Code otherwise allows the debtor to free itself from executory burdens. The approach also rests on a logic that invites further degradation of the debtor's fresh start options. Our colleague's alternative, "equitable" approach seems similarly flawed, and has the added drawback of imposing increased uncertainty and costs on the parties in bankruptcy proceedings. For these reasons, we favor the categorical approach of leaving trademark licenses unprotected from court-approved rejection, unless and until Congress should decide otherwise. *See* James M. Wilton & Andrew G. Devore, *Trademark Licensing in the Shadow of Bankruptcy*, 68 Bus. Law. 739, 771-76 (2013).

C.

Mission's final argument is that the bankruptcy court erred by not holding an adversary proceeding under Bankruptcy Rule 7001. Mission contends that because the rule governing adversary proceedings includes within its ambit determinations of an "interest in property," the bankruptcy court was required to hold such a hearing to determine the scope of Mission's rights. The bankruptcy court instead treated the issue as a contested matter under Rule 9014. We need not address this argument directly, because we find that

even if an adversary proceeding was required, any error was harmless.

Mission contends that it was prejudiced because it was not given a fair opportunity to develop an evidentiary record. But the issues at stake can be resolved—and are resolved, in our de novo review—without reliance on any disputed facts outside the four corners of the Agreement. The logical leap Mission asks us to make—that extrinsic evidence would be both appropriate and lead to a different result—is unsupported by any possible extrinsic evidence to which Mission points. Further, the bankruptcy court permitted Mission and Debtor to conduct discovery following its September 21, 2015 order. There is no evidence, however, that either party had a need for or in fact did conduct discovery, and if they did, Mission offers no explanation for how this discovery generated any factual dispute that need be resolved in a testimonial hearing. Requiring Debtor to commence an adversary proceeding would only have delayed the resolution of critical issues without changing the bankruptcy court's ultimate determination.

V.

For the foregoing reasons, the bankruptcy court's decision is *affirmed*.

TORRUELLA, Circuit Judge (Concurring in part, dissenting in part).

I agree with the majority that 11 U.S.C. § 365(n) does not protect Mission's exclusive distribution rights or its nonexclusive trademark license. The plain language of this subsection identifies "intellectual property," which, for purposes of chapter 11, does not encompass trademarks. *See* 11 U.S.C. § 101(35A). However, I disagree with the majority's bright-line rule that the omission of trademarks from the protections of section 365(n) leaves a non-rejecting party without any remaining rights to use a debtor's trademark and logo. As Judge Easterbrook wrote, "an omission is just an omission," and simply implies that section 365(n) does not determine how trademark licenses should be treated—one way or the other. *Sunbeam*, 686 F.3d at 375. I would follow the Seventh Circuit and the BAP in finding that Mission's rights to use Debtor's trademark did not vaporize as a result of Debtor's rejection of the executory contract.

The majority focuses on the Bankruptcy Code's protection of debtors' ability to reorganize and to escape "burdensome obligations." But, as the majority acknowledges, in some situations, the Bankruptcy Code also provides protections to non-debtor parties of an executory contract, allowing the courts to determine an equitable remedy pursuant to the terms of a rejected contract. *See Ohio v. Kovacs*, 469 U.S. 274, 280, 105 S.Ct. 705, 83 L.Ed.2d 649 (1985); *see also In re Nickels Midway Pier, LLC*, 255 Fed. Appx. 633, 637-38 (3d Cir. 2007); *Abbound*, 482 F.3d at 19. Thus, to determine the effect of a section 365(a) rejection on a trademark license, we look to the plain text of section 365 as a whole, which dictates the parameters of such a rejection of an executory contract.

A plain language review reveals section 365's silence as to the treatment of a trademark license post-rejection. Where a statute is silent, we look to the legislative history for assistance. *DiGiovanni v. Traylor Bros., Inc.*, 75 F.3d 748, 755 (1st Cir. 1996) (citing *Cabral v. I.N.S.*, 15 F.3d 193, 194 (1st Cir. 1994)). Resultantly, our examination leads us back to Congress's intent when it enacted section 365(n). The Senate Committee report makes clear that Congress enacted section 365(n) as a direct response to the Fourth Circuit's decision in *Lubrizol*, 756 F.2d 1043, where the court found that rejection of a contract for an intellectual property license deprived the licensee of all rights previously granted under that license. *See* S. Rep. No. 100-505, at 2-3. In so doing, Congress intended to "correct[ ] the perception of some courts that Section 365 was ever intended to be a mechanism for stripping innocent licensee [sic] of rights central to the operations of their ongoing business." *Id.*, at 4.

Specific to trademark licenses, the Senate Committee report explains that the purposeful omission of trademarks was not designed to leave trademark licensees unprotected, but rather was "designed to allow more time for study, not to approve *Lubrizol*." *Sunbeam*, 686 F.3d at 375. The relevant portion of the Senate report reads:

> [T]he bill does not address the rejection of executory trademark[s],.... While such rejection is of concern because of the interpretation of [§] 365 by the *Lubrizol* court and others, ... such contracts raise issues beyond the scope of this legislation. In particular, trademark ... relationships depend to a large extent on control of the quality of the products or services sold by the licensee. Since these matters could not be

> addressed without more extensive study, it was determined to postpone congressional action in this area and to allow the development of equitable treatment of this situation by bankruptcy courts.

S. Rep. No. 100-505, at 5. This legislative history expresses congressional concern about the application of *Lubrizol*'s holding to trademarks licenses until further studies are done, and, rather than continue to apply *Lubrizol*'s holding, encourages "equitable treatment" by the courts to resolve disputes arising in the meantime. *Id.* Why would Congress have provided this guidance if it meant for *Lubrizol*—the very case Congress rejected—to apply to trademark licenses? Congress has yet to advise the courts about the results of any further studies; as such, the majority's judicially created bright-line rule contravenes congressional intent.

The majority's view infers that the omission of trademarks from section 101(35A)'s definition of "intellectual property," and therefore the protections of section 365(n), implies that section 365 categorically affords no protections to licensees of trademarks. Yet, Congress's own interpretation of section 365(n) informs us that the bill does not "address or intend any inference to be drawn concerning the treatment of executory contracts which are unrelated to intellectual property." *Id.* "In light of these direct congressional statements of intent, it is simply more freight than negative inference will bear to read rejection of a trademark license to effect the same result as termination of that license." *In re Exide Techs.*, 607 F.3d at 967 (Ambro, J., concurring) (citation and internal quotation marks omitted).

Instead, like the BAP below, I find it appropriate to view a debtor's section 365(a) rejection through the broader lens of section 365, as the Seventh Circuit did in *Sunbeam*. Section 365(g) states that "the rejection of an executory contract or unexpired lease of the debtor constitutes a breach of such contract or lease." 11 U.S.C. § 365(g). Similar to other contractual breaches outside of the bankruptcy context, a rejection pursuant to section 365(a) does not automatically terminate a non-rejecting party's rights under a contract. *Sunbeam*, 686 F.3d at 377. Admittedly, "[w]hat the Bankruptcy Code provides, a judge cannot override by declaring that enforcement would be inequitable." *Id.* at 375 (internal quotation marks omitted). Given the Bankruptcy Code's silence as to the post-rejection rights that a trademark licensee does or does not retain, and in accordance with principles governing breaches of contract, we must resolve the dispute by looking to the terms of the contract to which these sophisticated parties agreed, and other applicable non-bankruptcy law. While the majority mistakenly insists that that this approach rejects the one followed in *Sunbeam*, it is precisely what the Seventh Circuit called for in finding that rejection does not abrogate a contract. *Id.* at 377. The majority takes issue with this consideration in what it terms as "some unspecified manner," but ignores that "the development of equitable treatment" is precisely what Congress has instructed the courts to do. *See* S. Rep. No. 100-505, at 6. Instead, the majority's view that a section 365(a) rejection eliminates a licensee's rights to the bargained-for use of a debtor's trademark effectively treats a debtor's rejection as a contract cancellation, rather than a contractual breach, putting the court at odds with legislative intent. It also "makes bankruptcy more a sword than a shield, putting debtor-licensors in a catbird seat they

often do not deserve." *In re Exide Techs.*, 607 F.3d at 967-68 (Ambro, J., concurring).

I respect my colleagues' concern that following the Seventh Circuit's holding that a section 365(a) rejection does not categorically eviscerate the trademark rights that a debtor-licensor bargained away may "require[ ] that the trademark owner—here Debtor—monitor and exercise control over the quality of the goods sold to the public" post-rejection. However, licensees have trademark quality assurance obligations under the terms of their individual contracts which can be enforced through further legal action and the equitable remedy of specific performance. In the current case, Mission's obligations are laid out in Section 15(d) of the Agreement, which states that, inter alia, Mission shall not use the trademarks in a disparaging or inaccurate manner, shall comply with written trademark guidelines, and shall not create a unitary composite mark. The majority speculates that the remaining burden on the debtor will be too great in the bankruptcy context, and therefore, if it "were in the chancellor's chair," it would not follow this approach. However, we need not enter such a debate as it is not the role of the courts to legislate, as the majority's approach effectively does, through the creation of bright-line rules in the face of congressional intent. Congress contemplated the majority's concern when it enacted section 365(n), recognizing "that there may be circumstances in which the future affirmative performance obligations under a license cannot be performed in a manner that benefits the estate." S. Rep. No. 100-505, at 4-5. The legislative history indicates that treatment of trademark licenses is one such circumstance.

Accordingly, the BAP was correct to follow the Seventh Circuit's lead in finding that, even though

11 U.S.C. § 365(n) does not provide Mission protection of its license to use Debtor's trademarks, Debtor's rejection of the executory contract does not rescind the Agreement and eviscerate any of Mission's remaining trademark rights. Instead, as Congress has instructed the bankruptcy courts to do, the effect of Debtor's rejection on Mission's trademark license should be guided by the terms of the Agreement, and non-bankruptcy law, to determine the appropriate equitable remedy of the functional breach of contract. I respectfully dissent.

APPENDIX B

UNITED STATES BANKRUPTCY
APPELLATE PANEL OF THE FIRST CIRCUIT

559 B.R. 809
BAP NO. NH 15–065
BANKRUPTCY CASE NO. 15–11400–JMD

IN RE TEMPNOLOGY LLC, N/K/A OLD COLD, LLC,
Debtor,

MISSION PRODUCT HOLDINGS, INC.,
Appellant,

v.

TEMPNOLOGY LLC, N/K/A OLD COLD, LLC,
Appellee.

November 18, 2016

Before Lamoutte, Hoffman, and Cary,
United States Bankruptcy Appellate Panel Judges

OPINION

Hoffman, U.S. Bankruptcy Appellate Panel Judge.

Mission Product Holdings, Inc. ("Mission") appeals from the bankruptcy court's November 12, 2015 order granting the Motion for Determination of Applicability and Scope of Mission Product Holdings, Inc.'s Election Pursuant to 11 U.S.C. § 365(n)(1)(B) (the "365(n) Motion") filed by Tempnology LLC, n/k/a Old Cold, LLC

(the "Debtor").[1] At issue before the bankruptcy court was what rights Mission, as a licensee of intellectual property, retained as a result of its election under Bankruptcy Code § 365(n)[2] when the Debtor rejected the executory contract that gave rise to the license. The bankruptcy court ruled that Mission retained its nonexclusive license to use the Debtor's intellectual property as set forth in the rejected contract, but not its exclusive product distribution rights or right to use the Debtor's trademark and logo also contained in the contract. For the reasons set forth below, we **AFFIRM IN PART** and **REVERSE IN PART.**

BACKGROUND

I. Events Preceding Bankruptcy

Prior to a sale of substantially all its assets in 2015, the Debtor was a Portsmouth, New Hampshire-based material innovation company that developed chemical-free cooling fabrics for use in consumer products under the brand name "Coolcore." Mission is in the business of marketing and distributing innovative sports technologies.

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[1] In conjunction with a sale of its assets, the Debtor was required to change its name upon the sale closing. The closing occurred on December 18, 2015, and on December 21, 2015, the Debtor filed a notice with the New Hampshire Secretary of State changing its name from Tempnology LLC to Old Cold, LLC. Thereafter, the bankruptcy court granted the Debtor's motion to amend the caption of its case to reflect the name change.

[2] Unless expressly stated otherwise, all references to "Bankruptcy Code" or to specific statutory sections shall be to the Bankruptcy Reform Act of 1978, as amended, 11 U.S.C. §§ 101, *et seq.* All references to "Bankruptcy Rule" shall be to the Federal Rules of Bankruptcy Procedure.

On November 21, 2012, the Debtor and Mission entered into a Co–Marketing and Distribution Agreement (the "Agreement"). In section 1 of the Agreement, entitled "Territory," the Debtor granted Mission exclusive distribution rights within the United States and "first rights of notice and of refusal in certain other countries" (collectively defined in the Agreement as the "Exclusive Territory") with respect to an array of the Debtor's products defined as "Cooling Accessories" and identified on Exhibit A of the Agreement. The Debtor also granted Mission the non-exclusive right to sell Cooling Accessories anywhere else in the world.

In section 5 of the Agreement, entitled "Product Exclusivity," the Debtor agreed that in the Exclusive Territory it would not license or sell certain specified Cooling Accessories, defined in the Agreement as "Exclusive Cooling Accessories," to anyone other than Mission during the term of the Agreement.[3]

In section 6, entitled "Distribution Exclusivity and Collaboration," the Debtor agreed that in the Exclusive Territory it would not sell *any* Cooling Accessories and certain other products directly or indirectly to any sporting goods and sport specialty retailers.

Section 7 of the Agreement, entitled "Cooperation and Further Assurances," provided:

> [T]hat (i) [the Debtor] shall take no actions to directly or indirectly frustrate its exclusivity

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[3] Exhibit A of the Agreement listing the Cooling Accessories provided that certain Cooling Accessories were exclusive—towels, wraps, hoodies, bandanas, "multi-chills," and doo rags—while other Cooling Accessories were identified as non-exclusive—socks, headbands, wristbands, sleeves, skull caps, yoga mats, and baselayers.

> obligations hereunder; (ii) [the Debtor] shall fully cooperate with [Mission] to ensure that no third parties take any actions that frustrate the purposes of the exclusivity provisions herein, and (iii) [the Debtor] shall take such actions as are necessary to enforce [the Debtor]'s intellectual property rights and contractual rights against third parties.

In section 15 of the Agreement, entitled "Intellectual Property," the Debtor granted Mission the following non-exclusive license (the "IP License"):

> Excluding those elements of the CC Property consisting of Marks [and] Domain Names, [the Debtor] hereby grants [Mission] and its agents and contractors a non-exclusive, irrevocable, royalty-free, fully paid-up, perpetual, worldwide, fully-transferable license, with the right to sublicense (through multiple tiers), use, reproduce, modify, and create derivative work based on and otherwise freely exploit the CC Property in any manner for the benefit of [Mission], its licensees and other third parties.

The Agreement defined "CC Property" as:

> [A]ll products (including without limitation the Cooling Accessories), personal products, inventions, designs, discoveries, improvements, innovations, ideas, drawings, images, works of authorship, formulas, methods, techniques, concepts, configurations, compositions of matter, packaging, labeling, software applications, databases, computer programs as well as other creative content, methodologies and materials in existence prior to this Agreement (or created outside the scope of this Agreement) or de-

> veloped or provided by [the Debtor] hereunder and all *Intellectual Property Rights* with respect to any of the foregoing, excluding any materials provided by [Mission].

(emphasis added). With respect to the Debtor's trademark and logo which were excluded from the IP License, section 15(d) of the Agreement granted Mission a limited license to use the Debtor's Coolcore trademark and logo as follows:

> During the Term of the Agreement and the Wind–Down Period, [the Debtor] grants to [Mission] a non-exclusive, non-transferable, limited license, which shall expire upon the termination of this Agreement except as necessary to allow either party to exercise its rights during the Wind–Down Period, to use its Coolcore trademark and logo (as well as any other Marks licensed hereunder) for the limited purpose of performing its obligations hereunder, exercising its rights and promoting the purposes of this Agreement as contemplated herein....

The upshot of the Agreement was that during the term of the Agreement Mission enjoyed the exclusive right to sell the Cooling Accessories to sporting goods retailers in the United States and potentially certain other countries, and the exclusive right to sell Exclusive Cooling Accessories to anyone in that same territory. Additionally, Mission received a non-exclusive but perpetual license to exploit the Debtor's intellectual property and a limited license during the term of the Agreement to exploit the Coolcore brand and logo.

The Agreement had an initial term of two years and was subject to automatic renewal for additional

one-year periods. Either party could terminate the Agreement with or without cause by providing written notice. Any event of termination, however, would trigger a two-year wind-down period during which Mission would retain certain rights to purchase, distribute, and sell the Cooling Accessories in accordance with the Agreement.

On June 30, 2014, Mission exercised its rights to terminate the Agreement without cause, triggering the two-year wind-down period. On July 22, 2014, the Debtor issued a notice of termination for cause, asserting that Mission had breached the Agreement. The ensuing dispute resulted in a two-phase arbitration process. On June 10, 2015, the arbitrator rendered a decision in the first phase of the arbitration, determining that the Agreement remained "in full force and effect." The second phase of the arbitration—as to whether either party had breached the Agreement—did not get very far as the Debtor's bankruptcy, and accompanying stay, brought the arbitration to a halt.

II. The Bankruptcy Case

On September 1, 2015, the Debtor filed a voluntary petition for reorganization under chapter 11 of the Bankruptcy Code. The next day, the Debtor filed a motion seeking authority to reject certain of its executory contacts, including the Agreement. The Debtor also filed a motion asking the bankruptcy court to approve the sale of substantially all of its assets free and clear of liens, claims, encumbrances, and other interests.

Mission filed an objection to the sale motion and the rejection motion, which included its notice of election pursuant to § 365(n)(1)(B). In its objection, Mission argued that notwithstanding the Debtor's rejection of the

Agreement, by making an election under § 365(n) Mission retained its exclusive product distribution rights as well as its rights under the IP License and the limited trademark license and that it could continue to exercise and exploit all those rights without interference from the Debtor or the purchaser of the Debtor's assets. Mission maintained that any sale of the Debtor's assets would be subject to, not free and clear of, Mission's rights under the Agreement.

The Debtor disagreed with Mission's view of the implications of its § 365(n) election. According to the Debtor, § 365(n) protects a non-debtor licensee's rights to intellectual property when a debtor rejects a license agreement embodying intellectual property, not other rights under the contract such as distribution rights. The Debtor contended that the exclusive product distribution provisions in the Agreement did not grant Mission a right to intellectual property but rather addressed the scope of available product distribution rights and, therefore, those distribution rights were not protected by the § 365(n) election.

After an initial hearing, the bankruptcy court entered an order authorizing the Debtor's rejection of certain executory contracts, but deferred its determination of the Debtor's proposed rejection of the Agreement. After additional briefing and another hearing, the bankruptcy court entered an order regarding rejection of the Agreement. The order provided in its entirety:

> The motion to reject the contract of Mission Product Holdings pursuant to 11 U.S.C. § 365(a) is granted and the contract is rejected as of the petition date subject to Mission Prod-

uct Holdings' election to preserve its rights under 11 U.S.C. § 365(n).

This prompted the Debtor to file the 365(n) Motion, seeking a determination that Mission's post-rejection rights were limited exclusively to the IP License and that the balance of Mission's rights under the Agreement, including any exclusive product distribution rights or the right to use the Debtor's trademark and logo, did not survive rejection. Mission objected on the ground that its § 365(n) election also protected its exclusive product distribution rights and the right to use the Debtor's trademark and logo for the remainder of the wind-down period. Mission also claimed that the 365(n) Motion was procedurally defective because a request for a determination as to the scope of Mission's property rights in the Debtor's intellectual property required the commencement of an adversary proceeding pursuant to Bankruptcy Rule 7001(2).

After a non-evidentiary hearing, the bankruptcy court entered the order being appealed (the "365(n) Order") granting the 365(n) Motion and ruling: (1) Mission's election pursuant to § 365(n) protected Mission rights as a non-exclusive licensee only as to any patents, trade secrets, and copyrights as were granted to Mission in section 15(b) of the Agreement (the section identifying the property subject to the IP License); (2) Mission's election pursuant to § 365(n) provided no protectable interest in the Debtor's trademarks or trade names; and (3) Mission's election pursuant to § 365(n) provided no protectable interest in the Debtor's "Exclusive Products" and the "Exclusive Territory" as those terms were defined in the Agreement.

In its accompanying Memorandum Opinion,[4] the bankruptcy court first determined that the protections of § 365(n) extended only to the intellectual property rights granted to Mission in the Agreement. The court examined the provisions of the Agreement granting Mission exclusive distribution rights, and concluded that, even though the products to which it applied, namely the Cooling Accessories, were patented, the exclusive distribution rights did not constitute a license of intellectual property and therefore were outside the protection afforded under § 365(n). The court determined that the exclusive distribution rights granted to Mission were unrelated to the IP License and thus although the IP License was protected under § 365(n), the distribution rights were not.

With respect to the Debtor's trademarks, the bankruptcy court concluded that, to the extent the Agreement granted Mission a non-exclusive right to use certain of the Debtor's trademarks and trade names, § 365(n) did not protect Mission's trademark license post-rejection, and, as a result, "Mission does not retain rights to the Debtor's trademarks and logos post-rejection." In so ruling, the court adopted the view articulated in cases such as *In re Old Carco LLC*, 406 B.R. 180 (Bankr. S.D.N.Y. 2009), that because the Bankruptcy Code's definition of "intellectual property" set forth in § 101(35A) does not include trademarks and trade names, those categories of intellectual property are not protected under § 365(n). The court declined to follow *In re Crumbs Bake Shop, Inc.*, 522 B.R. 766 (Bankr. D.N.J. 2014), which held that it was improper to draw a negative inference from the absence of any reference to trademarks and trade names in § 101(35A)

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[4] *In re Tempnology*, LLC, 541 B.R. 1 (Bankr. D.N.H. 2015).

for purposes of applying § 365(n) and that bankruptcy courts must exercise their equitable powers on a case-by-case basis to determine whether trademark licensees may retain their rights under § 365(n).

Finally, with respect to Mission's procedural argument, the bankruptcy court determined that the parties' dispute over the scope and applicability of § 365(n) arose as a result of the Debtor's rejection of the Agreement, which gave rise to a contested matter under Bankruptcy Rule 9014 and, therefore, the Debtor was not required to commence an adversary proceeding in order to obtain an adjudication of the 365(n) Motion.

JURISDICTION

The Panel has jurisdiction to hear appeals from final judgments, orders, and decrees of the bankruptcy court. *See* 28 U.S.C. § 158(a)(1). In the bankruptcy context, an order is "final" if it completely resolves "all of the issues pertaining to a discrete dispute within the larger proceeding." *Morse v. Rudler (In re Rudler)*, 576 F.3d 37, 43 (1st Cir. 2009) (quoting *Perry v. First Citizens Fed. Credit Union (In re Perry)*, 391 F.3d 282, 285 (1st Cir. 2004)). The 365(n) Order resolved conclusively what rights were preserved by Mission's § 365(n) election in response to the Debtor's rejecting the Agreement and, therefore, it is final. Thus, the Panel has jurisdiction to hear this appeal. *See In re Spansion, Inc.*, 507 Fed. Appx. 125, 127 (3d Cir. 2012) (considering appeal of bankruptcy court order determining creditor did not retain any rights pursuant to § 365(n) because the agreement between the parties was not a license); *In re Exide Techs.*, 607 F.3d 957, 961 (3d Cir. 2010) (considering appeal of order holding agreement was executory contract and rejection of the agreement terminated creditor's rights under the agreement).

STANDARD OF REVIEW

The Panel reviews a bankruptcy court's findings of fact for clear error and its conclusions of law de novo. *Jeffrey P. White & Assocs., P.C. v. Fessenden (In re Wheaton)*, 547 B.R. 490, 496 (1st Cir. BAP 2016) (citation omitted). This appeal concerns the bankruptcy court's interpretation of the Agreement and the relevant provisions of the Bankruptcy Code—questions of law reviewed de novo. *See OfficeMax, Inc. v. Levesque*, 658 F.3d 94, 97 (1st Cir. 2011) ("Contract interpretation, when based on contractual language without resort to extrinsic evidence, is a 'question of law' that is reviewed *de novo*.") (citation omitted); *Boston & Me. Corp. v. Mass. Bay Transp. Auth.*, 587 F.3d 89, 98 (1st Cir. 2009) ("[W]e review de novo issues of statutory interpretation ...."); *United States v. Yellin (In re Weinstein)*, 272 F.3d 39, 42 (1st Cir. 2001) ("A question of the interpretation of the Bankruptcy Code, like any other question of statutory interpretation, is a question of law that we review de novo.") (citation omitted). "De novo review means that the appellate court is not bound by the bankruptcy court's view of the law." *O'Rorke v. Porcaro*, 545 B.R. 384, 394 (1st Cir. BAP 2016) (citation omitted) (internal quotations omitted).

DISCUSSION

I. Applicable Law

Section 365(a) permits a trustee or debtor-in-possession, subject to court approval, to assume or reject any executory contract of the debtor. The rejection of an executory contract constitutes a breach of the contract as of the bankruptcy petition filing date, entitling the counter-party to damages. 11 U.S.C. § 365(g). Section 365(n) allows a counter-party who is the licen-

see under an intellectual property license to elect to retain certain rights under the contract notwithstanding the debtor's rejection. It provides, in relevant part, as follows:

> (n)(1) If the trustee rejects an executory contract under which the debtor is a licensor of a right to intellectual property, the licensee under such contract may elect—
>
> ...
>
> (B) to retain its rights (including a right to enforce any exclusivity provision of such contract, but excluding any other right under applicable nonbankruptcy law to specific performance of such contract) under such contract and under any agreement supplementary to such contract, to such intellectual property (including any embodiment of such intellectual property to the extent protected by applicable nonbankruptcy law), as such rights existed immediately before the case commenced, for—
>
> (i) the duration of such contract; and
>
> (ii) any period for which such contract may be extended by the licensee as of right under applicable nonbankruptcy law.
>
> (2) If the licensee elects to retain its rights, as described in paragraph (1)(B) of this subsection, under such contract—
>
> (A) the trustee shall allow the licensee to exercise such rights;

> (B) the licensee shall make all royalty payments due under such contract for the duration of such contract and for any period described in paragraph (1)(B) of this subsection for which the licensee extends such contract; and
>
> (C) the licensee shall be deemed to waive—
>
> > (i) any right of setoff it may have with respect to such contract under this title or applicable nonbankruptcy law; and
> >
> > (ii) any claim allowable under section 503(b) of this title arising from the performance of such contract.

11 U.S.C. § 365(n)(1) & (2).

Section 365(n)(3)(B) provides:

> If the licensee elects to retain its rights ... then on the written request of the licensee the trustee shall ... not interfere with the rights of the licensee as provided in such contract ... to such intellectual property (including such embodiment) including any right to obtain such intellectual property (or such embodiment) from another entity.

11 U.S.C. § 365(n)(3)(B).

"Thus, in the event that a bankrupt licensor rejects an intellectual property license, § 365(n) allows a licensee to retain its licensed rights—along with its duties—absent any obligations owed by the debtor-licensor." *In re Exide Techs.*, 607 F.3d at 966. Upon the licensee's election to retain its rights, the trustee or debtor-in-possession must allow the licensee to exercise those rights free from interference. 11 U.S.C. § 365(n)(2), (3).

Congress enacted § 365(n) in 1988 in response to the U.S. Court of Appeals for the Fourth Circuit's decision in *Lubrizol Enterprises, Inc. v. Richmond Metal Finishers, Inc.*, 756 F.2d 1043, 1048 (4th Cir. 1985), in which the court held that rejection of an intellectual property license deprived the licensee of all rights previously granted under the license. *Lubrizol* was widely criticized and the legislative history of § 365(n) makes it clear that Congress intended to overrule it. *See* S. Rep. No. 100–505, 5 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3201–3202. Lawmakers were concerned that technologists would respond to *Lubrizol* by insisting on outright assignments of intellectual property rather than agree to a licensing arrangement that could evaporate in the event of bankruptcy. *Id.* Seeing this as a threat to the system of licensing of intellectual property that had evolved in the United States, the Senate Report states that the purpose of § 365(n) was "to make clear that the rights of an intellectual property licensee to use the licensed property cannot be unilaterally cut off as a result of the rejection of the license pursuant to [§] 365 in the event of the licensor's bankruptcy." *Id.*

II. Issues on Appeal

In the present case, it is undisputed that, due to its § 365(n) election, Mission retained its rights under the IP License granted to it in section 15 of the Agreement and could exercise those rights free from interference by the Debtor.

Mission argues, however, that the bankruptcy court committed reversible error: (1) by ruling that Mission's § 365(n) election applied only to the IP License and not to the exclusive product distribution rights granted in the Agreement; (2) by ruling that notwithstanding its § 365(n) election Mission did not

retain any rights to use the Debtor's trademark and logo because those items are not included in the Bankruptcy Code's definition of "intellectual property"; and (3) by not requiring the Debtor to bring an adversary proceeding against Mission in order to obtain the relief sought in the 365(n) Motion.

A. **Whether the bankruptcy court erred in ruling that Mission's exclusive product distribution rights were not protected by its § 365(n) election.**

Mission argues that its exclusive product distribution rights were preserved as a result of its § 365(n) election because § 365(n) permits a licensee of intellectual property to retain its rights under the contract, "including a right to enforce *any* exclusivity provision of such contract" and "including any embodiment of such intellectual property." 11 U.S.C. § 365(n)(1)(B) (emphasis added). According to Mission, the Debtor's grant to Mission of exclusive rights to distribute Cooling Accessories in section 1 of the Agreement, and the Debtor's agreement in sections 5 and 6 not to license or sell Cooling Accessories to anyone else during the term of the Agreement, were "exclusivity provisions" and they related to the IP License because the Cooling Accessories were the "embodiment" of the Debtor's intellectual property. Thus, Mission contends, its § 365(n) election protected not only its non-exclusive IP License but also its exclusive product distribution rights.

As the bankruptcy court correctly observed, and the parties do not seriously dispute, an executory contract which may be subject to a § 365(n) election can contain terms and provisions unrelated to the licensing of intellectual property. Upon rejection of such a contract, the licensee's § 365(n) election applies only to its

rights to intellectual property and not to any other rights that it might have received under the executory contract. To conclude otherwise would allow the narrow exception of § 365(n) to upend the very purpose of § 365. Any executory contract could be made "rejection proof" by inserting in it an intellectual property license no matter how remote or untethered the license provision was from the other terms of the agreement.

The Agreement here deals with far more than the licensing of intellectual property. As reflected in its title, "Co-Marketing and Distribution Agreement," it confers on Mission the exclusive right to distribute the Debtor's products, namely its Cooling Accessories, in the United States and elsewhere around the world. Even a cursory reading of the Agreement makes it clear that the parties had two independent goals in entering into the Agreement: first, to grant Mission the right to distribute certain of the Debtor's products on an exclusive basis in a defined territory during a limited period; and second, to grant Mission a non-exclusive license to use some of the Debtor's intellectual property in perpetuity.

Mission also argues that the Debtor actually granted Mission two separate intellectual property licenses in the Agreement—the non-exclusive IP License provided in section 15 and an implied exclusive intellectual property license to defined products in a defined territory provided in sections 1, 5, 6, and 7 of the Agreement. According to Mission, the provisions by which the Debtor agreed that it would not interfere with Mission's product distribution rights in the Exclusive Territory and would refrain from selling or licensing the same products to third parties in that territory constituted the grant of an exclusive intellectual property license to Mission.

Mission's attempt to re-characterize its exclusive product distribution rights under the Agreement as an intellectual property license are unsupported by either the letter or the spirit of the Agreement. The product distribution provisions in sections 1, 5, 6, and 7 of the Agreement never use the terms license or intellectual property. They confer on Mission the exclusive right to sell certain of the Debtor's products in a defined territory and restrict the Debtor's ability to do the same, nothing more. These rights would have been viable and valuable even if the Agreement had not gone on to grant Mission the IP License.

Nor does the fact that the product distribution rights happen to be exclusive allow Mission's § 365(n) election to extend to those rights. The parenthetical reference in § 365(n)(1)(B) to "a right to enforce any exclusivity provision of such contract" refers "to such intellectual property." Thus, exclusivity provisions unrelated to an intellectual property license such as the exclusive product distribution rights in the Agreement are not protected by a § 365(n) election.

We conclude that the bankruptcy court did not err in ruling that the exclusive product distribution rights granted to Mission in the Agreement were unprotected by its § 365(n) election.

B. **Whether the bankruptcy court erred in ruling that Mission's rights in the Debtor's Coolcore trademark and logo were not protected by its § 365(n) election and, therefore, Mission did not retain any rights to the trademark and logo post-rejection.**

While the purpose of § 365(n) is to protect licensees of intellectual property, the section does not define the

term "intellectual property." Section 101(35A) does. It provides:

> The term "intellectual property" means—
>
> (A) trade secret;
>
> (B) invention, process, design, or plant protected under title 35 [relating to patents];
>
> (C) patent application;
>
> (D) plant variety;
>
> (E) work of authorship protected under title 17 [relating to copyrights]; or
>
> (F) mask work protected under chapter 9 of title 17 [relating to microchips];
>
> to the extent protected by applicable nonbankruptcy law.

11 U.S.C. § 101(35A). Conspicuously absent from the Code's definition are trademarks and trade names.[5]

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[5] Congress considered addressing the omission of trademarks from § 101(35A) when it enacted § 365(n) but ultimately chose not to do so. The Senate Report noted:

> [T]he bill does not address the rejection of executory trademark, trade name or service mark licenses by debtor-licensors. While such rejection is of concern because of the interpretation of [§] 365 by the *Lubrizol* court and others, ... such contracts raise issues beyond the scope of this legislation. In particular, trademark, trade name and service mark licensing relationships depend to a large extent on control of the quality of the products or services sold by the licensee. Since these matters could not be addressed without more extensive study, it was determined to postpone congressional action in this area and to allow the development of equitable treatment of this situation by bankruptcy courts[.]

After Congress enacted § 365(n), several courts directly addressed the issue of whether trademarks are protected under the statute. Some courts reasoned by negative inference that the omission of trademarks from § 101(35A) means that trademark licenses are not afforded any protection under § 365(n) and therefore electing licensees have no rights to use trademarks post-rejection. *See, e.g., In re Old Carco LLC*, 406 B.R. at 211 (holding that "[t]rademarks are not 'intellectual property' under the Bankruptcy Code" and, therefore, § 365(n) did not entitle licensees to retain their rights with respect to trademarks or to continue using them post-rejection); *In re HQ Global Holdings, Inc.*, 290 B.R. 507, 513 (Bankr. D. Del. 2003) ("[S]ince the Bankruptcy Code does not include trademarks in its protected class of intellectual property, *Lubrizol* controls and the Franchisees' right to use the trademarks stops on rejection."); *Raima UK Ltd. v. Centura Software Corp. (In re Centura Software Corp.)*, 281 B.R. 660, 674–75 (Bankr. N.D. Cal. 2002) ("Because § 365(n) plainly excludes trademarks, the court holds that [the licensee] is not entitled to retain any rights in [the licensed trademarks] under the rejected ... [t]rademark [a]greement.").

Other courts have expressed the view that reasoning by negative inference is inappropriate in the context of the rejection of trademark licenses and the scope of the § 365(n) election. *See, e.g., In re Exide Techs.*, 607 F.3d at 966 (Ambro, J., concurring) ("I believe such reasoning [by negative inference] is inapt for

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In re Crumbs Bake Shop, Inc., 522 B.R. at 771–72 (quoting S. Rep. No. 100–505, at 5, *reprinted in* 1988 U.S.C.C.A.N. 3204) (emphasis omitted).

trademark license rejections.");[6] *In re Crumbs Bake Shop, Inc.*, 522 B.R. at 772. Courts applying this approach rely on the legislative history of § 365(n), concluding that "Congress intended the bankruptcy courts to exercise their equitable powers to decide, on a case[-]by[-]case basis, whether trademark licensees may retain the rights listed under § 365(n)." *In re Crumbs Bake Shop, Inc.*, 522 B.R. at 772 (adopting rationale set forth by Judge Ambro in *In re Exide Techs.*). After considering the equities, the court in In re *Crumbs Bake Shop, Inc.* concluded that it would be inequitable to strip the trademark licensees of their rights under § 365(n) in the event of a rejection, as those rights were bargained away by the debtors.

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[6] In *In re Exide Technologies*, the Third Circuit held that a perpetual, exclusive, and royalty-free trademark license that was part of a larger, decade-old asset-purchase agreement pursuant to which the debtor had sold a certain business unit was not executory and, therefore, could not be rejected by the debtor. 607 F.3d at 963–64. In other words, the trademark license continued to exist because the debtor could not reject the contract. In his concurring opinion, Judge Thomas L. Ambro disagreed with the bankruptcy court's determination that rejection of the contract deprived the licensee of its right to use the trademark. *Id.* at 964–68. He considered the line of cases that concluded by negative inference that, because Congress did not include trademarks in the definition of intellectual property, it intended *Lubrizol's* holding to control when a debtor rejects a trademark license. Judge Ambro opined, however, that "it is 'simply more freight than negative inference will bear' to read rejection of a trademark license to effect the same result as termination of that license." *Id.* at 967. He contended that, even though rejection of a contract would be a breach, rejection would not terminate the licensee's rights, and the licensee might still use a trademark even after rejection. Further, Judge Ambro maintained that, "[r]ather than reasoning from negative inference to apply another Circuit's holding," the Third Circuit should have used its "equitable powers" to allow the licensee to continue using the debtor's trademark. *Id.* at 967.

> Courts may use § 365 to free a bankrupt trademark licensor from burdensome duties that hinder its reorganization. They should not ... use it to let a licensor take back trademark rights it bargained away. This makes bankruptcy more a sword than a shield, putting debtor-licensors in a catbird seat they often do not deserve.

Id. (quoting *In re Exide Techs.*, 607 F.3d at 967–68).

In *Sunbeam Products, Inc. v. Chicago American Manufacturing, LLC*, 686 F.3d 372 (7th Cir. 2012), the U.S. Court of Appeals for the Seventh Circuit declined to follow either approach in its entirety. While the Seventh Circuit agreed that a § 365(n) election does not protect licensee rights in trademarks due to the omission of trademarks from the definition of intellectual property, it rejected both the line of authority embracing *Lubrizol's* holding that a trademark license is terminated upon rejection and the reasoning of Judge Ambro that equitable principles could preserve a licensee's rights in trademarks post-rejection. Instead, the Seventh Circuit held that the debtor's rejection of a trademark license, which was part of a supply agreement that related to the manufacturing and sale of electric fans by a third party, did not automatically extinguish the licensee's right to use the debtor's trademarks. In response to cases such as *In re Old Carco, LLC*, *supra*, the court stated that "an omission is just an omission. The limited definition in § 101(35A) means that § 365(n) does not affect trademarks one way or the other." *Id.* at 375. The court examined the legislative history of § 365(n) and suggested that "the omission [of trademarks from the definition] was designed to allow more time for study, not to approve *Lubrizol*." *Id.* (citations omitted). It then rejected any equity-based at-

tempt to circumvent the statutory omission, stating that "[r]ights depend ... on what the Code provides rather than on notions of equity." *Id.* at 376.

The Seventh Circuit determined it was more appropriate to focus on § 365(g), which sets forth the consequences of a rejection under § 365(a). Under § 365(g) "the rejection of an executory contract or unexpired lease of the debtor constitutes a breach of such contract or lease ...." 11 U.S.C. § 365(g). By classifying rejection as a breach, § 365(g) establishes that in bankruptcy, as outside of it, the non-rejecting party's rights remain in place. *Sunbeam*, 686 F.3d at 377. Thus, rejection does not terminate the contract. *Id.* at 377–78. "[R]ejection is not the functional equivalent of a rescission [as *Lubrizol* suggests], rendering void the contract and requiring that the parties be put back in the positions they occupied before the contract was formed .... It merely frees the estate from the obligation to perform and has absolutely no effect upon the contract's continued existence." *Id.* at 377 (citations omitted) (internal quotations omitted).

Here, the bankruptcy court, after considering both the negative inference and equity-based lines of authority, adopted the former.[7] The court, noting that § 101(35A) identifies six categories of intellectual property that are subject to protection under § 365(n), none of which includes trademarks, concluded:

> Under the maxim of *expressio unius est exclusio alterious* the expression of one thing is the exclusion of other things, *see, e.g., United States v. Hernandez–Ferrer*, 599 F.3d 63, 67–68

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[7] The bankruptcy court made no references to the *Sunbeam* decision.

> (1st Cir. 2010)[,] the omission of trademarks from the definition of intellectual property in § 101(35A) indicates that Congress did not intend for them to be treated the same as the six identified categories.

In re Tempnology, LLC, 541 B.R. at 8. Thus, the bankruptcy court ruled that Mission "does not retain rights to the Debtor's trademarks and logos post-rejection." *Id.*

Although Mission acknowledges that the definition of intellectual property in § 101(35A) does not encompass the Debtor's trademark and logo, it argues that the bankruptcy court should have used its equitable powers to determine that Mission's rights in the Debtor's trademark and logo were protected by § 365(n). According to Mission, the legislative history of § 365(n) makes it clear that the statute's failure to encompass trademarks within the definition of intellectual property protected upon rejection was intended, not to resurrect the draconian result in *Lubrizol*, but to allow courts to determine on a case-by-case basis whether trademark rights should be preserved under § 365(n) on equitable grounds. Mission maintains, because the parties bargained for trademark rights under the Agreement, and because the Debtor's trademark and logo are inseparable from the Debtor's other intellectual property and the products themselves, that Mission's election to preserve its licensee rights should include its rights in the Debtor's trademark and logo.

The Debtor contends, however, that the bankruptcy court properly adopted the negative inference approach and that *Lubrizol* applies to the Debtor's trademark and logo. According to the Debtor, Congress unambiguously defined the types of intellectual

property entitled to protection under § 365(n), and it did not include trademarks in any of the protected categories. The Debtor maintains that courts may not look to legislative history to interpret unambiguous statutes and because the statute here is clear, there is no need to look to the legislative history to understand the scope of § 365(n). Thus, the Debtor maintains, the bankruptcy court correctly held that § 365(n) does not apply to the Debtor's trademark and logo and, therefore, Mission does not have a "protectable interest in the Debtor's trademarks that survive[d] rejection...."

We agree that § 365(n) incorporates the definition of intellectual property set forth in § 101(35A), and that the definition does not encompass trademarks and logos. But we decline Mission's invitation to rule that, despite the omission of trademarks from the Code's definition of intellectual property, Mission's licensee rights in the Debtor's trademark and logo should be preserved under § 365(n) on equitable grounds as suggested in § 365(n)'s legislative history. "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992) (collecting authorities). Thus, if a statute is unambiguous, the court need not resort to legislative history to construe its meaning. Moreover, "[w]hat the Bankruptcy Code provides, a judge cannot override by declaring that enforcement would be 'inequitable.' " *Sunbeam*, 686 F.3d at 375. While it is true that the legislative history expresses the sentiment that bankruptcy courts develop the "equitable treatment" of trademarks under § 365(n), we are not bound by Congress' aspirational asseverations.

We agree with the bankruptcy court that, based on a plain reading of the statute, Mission's rights in the

Debtor's trademark and logo were not and could not be protected by its § 365(n) election. We must part company with the bankruptcy court, however, on the *effect* the Debtor's rejection of the Agreement had on Mission's licensee rights in the Debtor's trademark and logo. The bankruptcy court ruled that, because the Debtor's trademark and logo were not protected by Mission's election under § 365(n), Mission did "not retain rights to the Debtor's trademarks and logos post-rejection." This conclusion endorses *Lubrizol's* approach to the rejection of executory contracts, namely that rejection terminates the contract. *Lubrizol*, however, is not binding precedent in this circuit and, like the many others who have criticized its reasoning,[8] we do not believe it articulates correctly the consequences of rejection of an executory contract under § 365(g). We adopt *Sunbeam's* interpretation of the effect of rejection of an executory contract under § 365 involving a trademark license.

> What § 365(g) does by classifying rejection as breach is establish that in bankruptcy, as out-

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[8] *See, e.g., In re Exide Techs.*, 607 F.3d at 966 (concurring opinion by Judge Ambro) (disagreeing with bankruptcy court's determination that *Lubrizol* and its progeny " 'retain vitality' " as they relate to trademark licenses); *In re Crumbs Bake Shop, Inc.*, 522 B.R. at 770 ("This Court is not persuaded by the decision in *Lubrizol* and is not alone in finding that its reasoning has been discredited.") (citing *Sunbeam*, 686 F.3d at 377–78). In addition, scholars uniformly criticize *Lubrizol*, concluding that it confuses rejection with the use of an avoiding power. *See, e.g.*, Douglas G. Baird, *Elements of Bankruptcy* 130–40 & n.10 (4th ed. 2006); Michael T. Andrew, *Executory Contracts in Bankruptcy: Understanding "Rejection"*, 59 U. Colo. L. Rev. 845, 916–19 (1988); Jay Lawrence Westbrook, *The Commission's Recommendations Concerning the Treatment of Bankruptcy Contracts*, 5 Am. Bankr. Inst. L. Rev. 463, 470–72 (1997).

> side of it, the other party's rights remain in place. After rejecting a contract, a debtor is not subject to an order of specific performance. *See NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 531, 104 S.Ct. 1188, 79 L.Ed.2d 482 (1984); *Midway Motor Lodge of Elk Grove v. Innkeepers' Telemanagement & Equipment Corp.*, 54 F.3d 406, 407 (7th Cir. 1995). The debtor's unfulfilled obligations are converted to damages; when a debtor does not assume the contract before rejecting it, these damages are treated as a pre-petition obligation, which may be written down in common with other debts of the same class. But nothing about this process implies that any rights of the other contracting party have been vaporized.

Sunbeam, 686 F.3d at 377.

Applying *Sunbeam's* rationale, we conclude that, while the Debtor's trademark and logo were not encompassed in the categories of intellectual property entitled to special protections under § 365(n), the Debtor's rejection of the Agreement did not vaporize Mission's trademark rights under the Agreement. Whatever post-rejection rights Mission retained in the Debtor's trademark and logo are governed by the terms of the Agreement and applicable non-bankruptcy law.

Thus, we conclude that the bankruptcy court did not err in ruling that Mission's § 365(n) election failed to protect its rights under the Agreement as licensee of the Debtor's trademark and logo, but it erred in ruling that Mission's rights in the Debtor's trademark and logo as set forth in the Agreement terminated upon the Debtor's rejection of the Agreement.

C. **Whether the bankruptcy court erred in deciding the 365(n) Motion without requiring the Debtor to commence an adversary proceeding?**

Mission argues that the bankruptcy court committed error in deciding the 365(n) Motion without requiring the Debtor to commence an adversary proceeding under Bankruptcy Rule 7001. The bankruptcy court viewed the dispute as to the scope and applicability of § 365(n) in the context of the Debtor's motion to reject the Agreement, from which it arose, treating it is a contested matter under Bankruptcy Rule 9014.

Bankruptcy Rule 7001 requires an adversary proceeding in order, among other things, "to determine the validity, priority or extent of a lien or other interest in property" or for a declaratory judgment relating to the foregoing. Fed. R. Bankr. P. 7001(2) & (9). According to Mission, by its 365(n) Motion, the Debtor sought a declaratory judgment regarding the enforceability of Mission's rights, how those rights related to the rights of the Debtor (or the purchaser of the Debtor's assets), and the scope of the specific property to which Mission's rights attached. Thus, Mission contends, the Debtor was seeking a final determination of the extent of Mission's rights in certain property, including its rights to the Debtor's intellectual property, and the matter could only be adjudicated through an adversary proceeding.

In support, Mission cites *In re Eastman Kodak Co.*, No. 12–10202, 2012 WL 2255719 (Bankr. S.D.N.Y. June 15, 2012), contending that the 365(n) Motion requested relief "that is nearly identical to the relief sought in *In re Eastman Kodak* ...." In that case, Eastman Kodak Company and certain affiliates planned

to sell its digital imaging patents as part of its chapter 11 reorganization efforts. Two parties, Apple Inc. and FlashPoint Technology, Inc., disputed Kodak's ownership of ten digital imaging patents. Kodak filed a motion for an order in aid of the planned sale requesting a finding that Apple and FlashPoint had no ownership interests in the disputed patents and permitting a sale free and clear of their claims. Apple and FlashPoint objected, asserting, among other things, that the motion was procedurally improper because their ownership rights could not be determined summarily by motion. The bankruptcy court agreed, concluding the relief sought by Kodak was "for all intents and purposes, an action for a declaratory judgment to determine an interest in property by excluding the claimed interests of Apple and Flashpoint," and accordingly ruled that the matter had to be brought as an adversary proceeding, not as a contested motion. *Id.* at *2.

In contrast to the case before us, *In re Eastman Kodak* dealt with a dispute over ownership of property. Here, the dispute is over the scope of Mission's rights as a licensee of intellectual property in light of its election under § 365(n) after the Debtor rejected the contract giving rise to the license. Mission has never asserted ownership rights in the Debtor's property as Apple and FlashPoint did in *In re Eastman Kodak*.

Our case is more akin to *In re The Education Resources Institute, Inc.*, 442 B.R. 20 (Bankr. D. Mass. 2010). In that case, the debtor, The Education Resources Institute, Inc. ("TERI"), filed a "Motion for Interpretation of Order" asking the court to interpret an order authorizing the rejection of certain contracts with The First Marblehead Corporation. *Id.* at 21. TERI and First Marblehead disagreed about the implications of the court's order authorizing the rejection of

certain contracts between the parties, including the parties' rights with respect to TERI's loan database. First Marblehead argued that the motion should be denied, because it sought declaratory and injunctive relief and therefore must be filed as an adversary proceeding under Bankruptcy Rule 7001. The bankruptcy court disagreed, noting:

> The Court agrees with First Marblehead that, to the extent TERI asks the Court to enjoin First Marblehead from doing anything or asks the Court to order First Marblehead to take a particular action, Rule 7001(7) requires the filing of an adversary proceeding. ... But to the extent the motion asks the Court merely to interpret the Contracts Order, a request which *does* strike the Court as one for declaratory relief, an adversary proceeding is not required.... Standing alone, TERI's request for an interpretation of the Contracts Order is not related to any of the types of relief listed in subsections (1) through (8) of that Rule and may be brought by motion as a contested matter pursuant to Bankruptcy Rules 9013 and 9014.

Id. at 23–24 (citations omitted).

The bankruptcy court also noted First Marblehead would not be prejudiced by the procedure employed. The court observed:

> There are no factual issues in dispute requiring an extended discovery period or evidentiary hearing and both parties have had a fair opportunity to fully address the relevant legal issues. Accordingly, requiring the filing of an adversary proceeding at this juncture would provide nothing other than fruitless delay.

Id. at 24 (citing *In re NSCO, Inc.*, 427 B.R. 165, 176 n.12 (Bankr. D. Mass. 2010) (failure to file adversary proceeding excused where parties given fair opportunity to address issues in the context of a contested matter and no factual issues were in dispute); *Aegean Fare, Inc. v. Massachusetts (In re Aegean Fare, Inc.)*, 33 B.R. 745, 746 n.1 (Bankr. D. Mass. 1983) (failure to file adversary proceeding excused where issues were clearly delineated in motion and non-moving party was able to draft detailed response)).

In this case, the Debtor filed the 365(n) Motion seeking an interpretation of the bankruptcy court's order granting the Debtor's request to reject the Agreement, and the scope of Mission's retained rights after such rejection in light of its § 365(n) election, a request which may be interpreted as one for declaratory relief. The Debtor was not seeking a determination of the validity or extent of a lien or interest in property.

In any event, even if the 365(n) Motion should have been filed as an adversary proceeding, the bankruptcy court's failure to require the Debtor to do so was harmless error as there was no prejudice to Mission. Neither party expressed the need for or engaged in any discovery. Nor were there any facts in dispute. The parties were given ample opportunity to brief all issues and were given a full and fair hearing. Requiring the Debtor to file an adversary proceeding would only have delayed resolution of the critical issues in dispute and added unnecessary expense on both sides.

In light of the foregoing, we conclude the bankruptcy court did not err in deciding the 365(n) Motion without requiring the Debtor to commence an adversary proceeding under Bankruptcy Rule 7001.

CONCLUSION

For the reasons set forth above, we **AFFIRM IN PART** and **REVERSE IN PART**. We **REVERSE** the 365(n) Order to the extent the bankruptcy court ruled that Mission's rights in the Debtor's trademark and logo as set forth in the Agreement terminated upon the Debtor's rejection of the Agreement. We **AFFIRM** all other aspects of the 365(n) Order, including the bankruptcy court's ruling that Mission's § 365(n) election did not protect its rights under the Agreement as licensee of the Debtor's trademark and logo.

APPENDIX C

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE

Bk. No. 15-11400-JMD
Chapter 11

TEMPNOLOGY, LLC,

Debtors,

ORDER

This proceeding having come before the Court on November 3, 2015, for hearing on the Debtor's Motion for Determination of the Applicability and Scope of Mission Product Holdings, Inc.'s Election Pursuant to 11 U.S.C. § 365(n)(1)(B) (Doc. No. 211) (the "Motion"), and the Court having issued its memorandum opinion of even date, it is hereby ORDERED:

1. The Motion is granted.
2. Mission Product Holdings, Inc.'s ("Mission") election pursuant to 11 U.S.C. § 365(n) provides Mission rights as a non-exclusive licensee only as to any patents, trade secrets, and copyrights as are granted to Mission in section 15(b) of the Agreement.
3. Mission's election pursuant to 11 U.S.C. § 365(n) provides no protectable interest in the Debtor's trademarks or trade names.
4. Mission's election pursuant to 11 U.S.C. § 365(n) provides no protectable interest in the Debtor's "Exclusive Products" and the "Exclusive Terri-

tory" as those terms are defined in the Agreement.

This is a core proceeding in accordance with 28 U.S.C. § 157(b) as to which this Court has jurisdiction of the subject matter and the parties.

ENTERED at Manchester, New Hampshire.

Dated: November 12, 2015

/s/ J. Michael Deasy
J. Michael Deasy
Bankruptcy Judge

APPENDIX D

UNITED STATES BANKRUPTCY COURT
D. NEW HAMPSHIRE

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541 B.R. 1
Bk. No. 15–11400–JMD

IN RE TEMPNOLOGY, LLC, DEBTORS

Signed November 12, 2015

MEMORANDUM OPINION

J. Michael Deasy, Bankruptcy Judge

I. INTRODUCTION

The matter before the Court is the "Debtor's Motion for Determination of the Applicability and Scope of Mission Product Holdings, Inc.'s Election Pursuant to 11 U.S.C. § 365(n)(1)(B)" (Doc. No. 211) (the "Motion") filed by Tempnology, LLC (the "Debtor"), the chapter 11 debtor-in-possession, and the objection thereto filed by creditor Mission Product Holdings, Inc. ("Mission"). On October 2, 2015, the Court entered an order granting the Debtor's motion to reject its contract with Mission subject to Mission's election to preserve its rights under 11 U.S.C. § 365(n).[1] Through the present Motion,

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[1] Unless expressly stated otherwise, all references to "Bankruptcy Code" or to specific sections shall be to the Bankruptcy Reform Act of 1978, as amended by the Bankruptcy Abuse Pre-

the Debtor seeks a determination that those rights do not extend to the grant of certain exclusive distribution rights or to the use of the Debtor's trademarks and logos. For the reasons set forth below, the Court will grant the Motion.

II. JURISDICTION

This Court has authority to exercise jurisdiction over the subject matter and the parties pursuant to 28 U.S.C. §§ 157(a), 1334, and U.S. District Court for the District of New Hampshire Local Rule 77.4(a). This is a core proceeding under 28 U.S.C. § 157(b).

III. FACTS

The facts are not in dispute. The Debtor is a Portsmouth, New Hampshire based material innovation company that, among other things, develops chemical-free cooling fabrics under the Coolcore brand for use in consumer products.

On November 21, 2012, the Debtor and Mission entered into a Co–Marketing and Distribution Agreement (the "Agreement"). Pursuant to section 1(A) of the Agreement, the Debtor granted Mission "exclusive distribution rights within the United States and first rights of notice and of refusal ... on exclusive distribution rights in certain other countries," defined as the "Exclusive Territory," with respect to "the Cooling Accessories," defined as products of specific types that are listed in an attached exhibit to the Agreement and cer-

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vention and Consumer Protection Act of 2005 ("BAPCPA"), Pub.L. No. 109–8, 119 Stat. 23, 11 U.S.C. § 101, *et seq.* All references to "Bankruptcy Rule" shall be to the Federal Rules of Bankruptcy Procedure.

tain future derivatives of those products.[2] In section 5 of the Agreement, the Debtor agreed that "it will not license or sell the Cooling Accessories ... to anyone other than [Mission] during the Term" of the Agreement in the Exclusive Territory.[3] Similarly, in section 6 of the Agreement, the Debtor agreed that "[i]n the U.S. and elsewhere in the Exclusive Territory ... it will not sell any Cooling Accessories, New Products or Cooling Accessory Derivatives, directly or indirectly, to any retailer or other entity ... throughout the Term." Finally, section 7 of the Agreement, titled "Cooperation and Further Assurances," provides in relevant part:

> [The Debtor] agrees that (i) it shall take no actions to directly or indirectly frustrate its exclusivity obligations hereunder; (ii) [the Debtor] shall fully cooperate with [Mission] to ensure that no third parties take any actions that frustrate the purposes of the exclusivity provisions herein, and (iii) [the Debtor] shall take such actions as are necessary to enforce [the Debtor's] intellectual property rights and contractual rights against third parties."[4]

Mission's "product exclusivity rights as delineated in Sections 5 and 6" were subject to it meeting certain purchasing forecasts as described in section 8 of the Agreement.[5]

Intellectual property is addressed in section 15 of the Agreement. Subparagraph (a) broadly defines "In-

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[2] *Id.* at § 1(A).

[3] *Id.* at § 5.

[4] *Id.* at § 7.

[5] *Id.* at § 8.

tellectual Property Rights" to include, *inter alia*, the Debtor's copyrights, patentable and unpatentable inventions, discoveries, designs, technology, trademarks, and trade secrets.[6] In subsection (b), the Debtor granted Mission the following license (the "Non-Exclusive License"):

> Excluding those elements of the CC Property consisting of Marks, Domain Names, [the Debtor] hereby grants to [Mission] and its agents and contractors a nonexclusive, irrevocable, royalty-free, fully paid-up, perpetual, worldwide, fully-transferrable license, with the right to sublicense (through multiple tiers), use, reproduce, modify, and create derivative work based on and otherwise freely exploit the CC Property in any manner for the benefit of [Mission], its licensees and other third parties.[7]

"CC Property" is defined, in relevant part, as "all products (including without limitation the Cooling Accessories) ... developed or provided by [the Debtor] hereunder and all Intellectual Property Rights with respect to any of the foregoing...."[8] In subsection (d), the Debtor granted Mission "a non-exclusive, non-transferable, limited license ... to use its Coolcore trademark and logo (as well as any other Marks licensed hereunder) for the limited purpose of performing its obligations hereunder" during the term of the Agreement.[9]

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[6] *Id.* at § 15(a).

[7] *Id.* at § 15(b).

[8] *Id.*

[9] *Id.* at § 15(d).

The Agreement had an initial term of two years and was subject to renewal.[10] Either party could terminate the Agreement without cause upon written notice.[11] Any event of termination, however, would trigger a two year wind down period during which Mission would retain the right to purchase, distribute, and sell the Cooling Accessories in accordance with the provisions of the Agreement.[12]

The Debtor filed a voluntary chapter 11 petition on September 1, 2015. The following day, on September 2, 2015, the Debtor filed an omnibus motion to reject executory contracts *nunc pro tunc* to the petition date, including the Agreement. Mission objected asserting that the Agreement was not executory, and expressly reserving its rights under § 365(n). On October 2, 2015, the Court held a hearing on rejection and, after the conclusion of oral arguments, entered an order allowing the Debtor to reject the Agreement subject to Mission's election to retain its rights under § 365(n).

On October 15, 2015, the Debtor filed the Motion seeking a determination that Mission's rights under § 365(n) were limited to only the grant of the Non–Exclusive License under section 15(b) of the Agreement. Mission objected, asserting that § 365(n) also protected its exclusive distribution rights and use of the Debtor's trademarks for the remainder of the wind down period, which will expire in July, 2016.[13] The

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[10] *Id.* at § 2.

[11] *Id.* at § 3.

[12] *Id.* at § 4.

[13] Mission also argued that the Motion was procedurally improper and the relief requested must be the subject of an adversary proceeding under Fed. R. Bankr. P. 7001(2) and (9). The

Court heard oral arguments on November 3, 2015, and, in light of the imminent auction of the Debtor's assets free and clear of all liens and interests, indicated its intention to grant the Motion, but took the matter under advisement in order to complete the findings and rulings in this opinion.

IV. POSITIONS OF THE PARTIES

A. *The Debtor*

The Debtor does not dispute that the Non–Exclusive License, granted to Mission pursuant to section 15(b) of the Agreement, is entitled to protection under § 365(n), but argues that Mission's so-called "exclusivity rights" under sections 1, 5, 6, and 7 of the Agreement are not. The Debtor contends that these provisions simply grant exclusive distribution rights and are not rights to intellectual property. For this reason, the Debtor asserts that Mission places too much emphasis on the parenthetical language of § 365(n) that states "including a right to enforce any exclusivity provision of such contract" without acknowledging that the provision only applies to "rights ... to such intellectual property." 11 U.S.C. § 365(n)(1)(B).

Additionally, the Debtor argues Mission does not retain any rights to the Debtor's trademarks under the Agreement. To start, the Debtor notes that trademarks were excluded from the definition of CC Property in section 15(b) of the Agreement, and are not part of the Non–Exclusive License. Instead, Mission's license to use the Debtor's trademarks under the Agreement

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Court rejected this argument, viewing the Motion in the context of rejection under § 365, which is a contested matter under Fed. R. Bankr. P. 9014.

was expressly limited in section 15(d) of the Agreement. In any event, the Debtor asserts that the omission of trademarks from § 101(35A) mandates the conclusion that trademarks are not protected under § 365(n).

B. *Mission*

The primary thrust of Mission's argument is that § 365(n) permits a licensee of intellectual property to retain its rights "including a right to enforce *any* exclusivity provision of such contract." 11 U.S.C. § 365(n)(1)(B) (emphasis added). Mission construes its exclusivity rights under sections 1, 5, 6, and 7 of the Agreement as the grant of an exclusive license apart from the Non–Exclusive License under section 15(b) of the Agreement. In doing so, it focuses on the language sections 5 and 6 of the Agreement where the Debtor agrees that it will not license or sell the Cooling Accessories to anyone else during the term of the Agreement. Contending that one cannot sell without a license, Mission urges that the negative language implies the grant of an exclusive license to the underlying products.

Mission counters the Debtor's assertion that this exclusive license is not one to intellectual property by emphasizing that § 365(n) explicitly applies to "any embodiment of such intellectual property." 11 U.S.C. § 365(n). Mission posits that because it has the exclusive right to distribute the Cooling Accessories, and the Cooling Accessories are the embodiment of the Debtor's intellectual property subject to patents, these exclusive rights must fall within the protection of § 365(n). Mission finds further support for its position in section 7 of the Agreement, wherein the Debtor agrees

to take such actions to enforce the Debtor's intellectual property rights from third parties.

With respect to the Debtor's trademarks, Mission disagrees that they fall outside the definition of intellectual property in the Bankruptcy Code. Instead, it relies on *In re Crumbs Bake Shop, Inc.*, 522 B.R. 766, 772 (Bankr. D.N.J. 2014), for the proposition that the Court may use its equitable powers to determine whether a licensee may retain rights to a debtor's trademarks post-rejection.

V. DISCUSSION

Section 365(a) of the Bankruptcy Code permits a debtor-in-possession to assume or reject any executory contract of the debtor subject to Court approval. 11 U.S.C. § 365(a). The rejection of an executory contract constitutes a breach of the contract as of the petition date, entitling the counter-party to damages. 11 U.S.C. § 365(g). Section 365(n), however, affords additional protections to licensees of intellectual property. It provides:

If the trustee rejects an executory contract under which the debtor is a licensor of a right to intellectual property, the licensee under such contract may elect-

(A) to treat such contract as terminated by such rejection if such rejection by the trustee amounts to such a breach as would entitle the licensee to treat such contract as terminated by virtue of its own terms, applicable nonbankruptcy law, or an agreement made by the licensee with another entity; or

(B) to retain its rights (including the right to enforce any exclusivity provision of such contract, but excluding any other right under applicable nonbankruptcy law to specific performance of such contract) under

such contract and under any agreement supplementary to such contract, to such intellectual property (including any embodiment of such intellectual property to the extent protected by applicable nonbankruptcy law), as such rights existed immediately before the case commenced for-

> (i) the duration of such contract; and
>
> (ii) any period for which such contract may be extended by the licensee as of right under applicable nonbankruptcy law.

11 U.S.C. § 365(n)(1). "Thus, in the event that a bankrupt licensor rejects an intellectual property license, § 365(n) allows a licensee to retain its licensed rights along with its duties absent any obligations owed by the debtor-licensor." *In re Exide Techs.*, 607 F.3d 957, 965 (3d Cir. 2010) (Ambro, J., concurring). Upon the licensee's election to retain its rights, the trustee or debtor-in-possession must allow the licensee to exercise those rights free from interference. 11 U.S.C. § 365(n)(2), (3).

Congress enacted § 365(n) as a direct response to the decision by the United States Court of Appeals for the Fourth Circuit in *Lubrizol Enters., Inc. v. Richmond Metal Finishers, Inc.*, 756 F.2d 1043 (4th Cir. 1985). In *Lubrizol*, the Fourth Circuit held that rejection of an intellectual property license deprives the licensee of the rights previously granted under the license. *Id.* at 1048. The result was widely viewed as unjust, as monetary damages, assuming the debtor's estate could eventually pay them, would not make up for the loss of a one of a kind technology around which the licensee built its business. *See* S. Rep. No. 100–505, 100th Cong. 2d Sess. (1988), reprinted in 1988 U.S.C.C.A.N. 3201–3202. Lawmakers were concerned

that technologists would respond to *Lubrizol* by insisting on outright assignments of intellectual property rather than agree to a licensing arrangement that could evaporate in the event of bankruptcy. *Id.* at 3202. Seeing this as a threat to the system of licensing of intellectual property that had evolved in the United States, the express purpose of § 365(n) was "to make clear that the rights of an intellectual property licensee to use the licensed property cannot be unilaterally cut off as a result of the rejection of the license pursuant to Section 365 in the event of the licensor's bankruptcy." *Id.* at 3200.

In the present case, no one disputes that under § 365(n), Mission retains the Non–Exclusive License granted to it pursuant to section 15(b) of the Agreement and may exercise those rights free from interference by the Debtor or any prospective buyer. Therefore, the only issues before the Court are whether Mission retains its exclusive distributions rights and rights to the Debtor's trademarks.

While there is no question that a contract, like the Agreement, can serve more than one purpose, it is clear from both the statutory text of § 365(n) and its legislative history that the protection afforded to licensees is solely limited to intellectual property rights. Thus, not all rights under an executory contract that licenses intellectual property will necessarily be retained post-rejection. The central question is whether the rights claimed are truly "rights to ... intellectual property." 11 U.S.C. § 365(n)(1)(B). For several reasons, the Court finds that Mission's exclusivity rights are not.

Although not dispositive, it is apparent that the focus of the Agreement is marketing and distribution. To that end, section 1(A) of the Agreement is a grant of

"exclusive distribution rights" with respect to the Cooling Accessories. Even when read in conjunction with sections 5, 6, and 7, of the Agreement, there is nothing that to suggest that the rights granted by those paragraphs amount to anything more than the right to sell and distribute specified products. In contrast, the Non–Exclusive License granted in section 15(b) of the Agreement uses wholly dissimilar language and is explicit in its effect.

Critically, the Non–Exclusive License appears to be unrelated to the distribution aspect of the Agreement. Indeed, under the Non–Exclusive License, Mission's ability to "reproduce" and "freely exploit" the "CC Property," which includes the Cooling Accessories and all Intellectual Property Rights, seemingly renders distribution irrelevant in as much as Mission no longer needed the Debtor to manufacture and sell the products. In this way, the Non–Exclusive License, which is perpetual, irrevocable, and royalty free, appears to serve as consideration for Mission's efforts in marketing and selling the Debtor's products, and protection from the Debtor's termination of the Agreement after Mission had done substantial work building the market and the brand.

Admittedly, the Cooling Accessories are patented products, but the Court is unpersuaded that Mission's exclusive right to sell them, by itself, rises to the level of a protected right to the "embodiment of ... intellectual property" under § 365(n)(1)(B). Section 365(n) is a narrow exception to the general rule that counterparties to executory contracts are left with only a claim for damages upon rejection. Construing the naked right to sell a patented product as a right to intellectual property itself would extend the protection of § 365(n) far beyond its stated purpose of protecting the licensee

that builds its business around licensed intellectual property to which there is no substitute. Not surprisingly, Mission has not cited any case that has applied § 365(n) so broadly, which may explain why this argument was raised for the first time at the November 3, 2015, hearing and did not appear in its papers.

For all these reasons the Court concludes that the exclusive distribution rights granted to Mission in the Agreement are not rights that it retains post-rejection under § 365(n)(1)(B).

The final issue before the Court is whether Mission retains rights to the Debtor's trademarks post-rejection. The Bankruptcy Code defines "intellectual property" to include trade secrets, inventions, processes, designs, plants protected under title 35, patent applications, plant varieties, works of authorship protected under title 17, or mask work protected under chapter 9 of title 17. 11 U.S.C. § 101(35A). Notably absent from the list is trademarks, which according to the accompanying Senate Report, was consciously excluded because further study was needed before taking legislative action. *See* S. Rep. No. 100–505, 100th Cong.2d Sess. 5 (1988), reprinted in 1988 U.S.C.C.A.N. 3201–3204. A minority of courts conclude, as Mission urges this Court to do, that "Congress intended the bankruptcy courts to exercise their equitable powers to decide, on a case by case basis, whether trademark licensees may retain the rights listed under § 365(n)." *In re Crumbs Bake Shop, Inc.*, 522 B.R. at 772; *see In re Exide Techs.*, 607 F.3d at 966 (Ambro, J., concurring). Most courts, however, reason by negative inference that the omission of trademarks from § 101(35A) means that *Lubrizol's* holding was not overruled with respect to trademark licenses and those rights are not afforded any protection under § 365(n). *See e.g., In re Old Carco*

LLC, 406 B.R. 180, 211 (Bankr. S.D.N.Y. 2009); *In re Dynamic Tooling Sys., Inc.*, 349 B.R. 847, 856 (Bankr. D. Kan. 2006); *In re HQ Global Holdings, Inc.*, 290 B.R. 507, 513 (Bankr. D. Del. 2003); *In re Centura Software Corp.*, 281 B.R. 660, 674–75 (Bankr. N.D. Cal. 2002).

Having reviewed both lines of reasoning, the Court finds the rationale of the majority more persuasive. Section 101(35A) identifies six categories of intellectual property that will be subject to protection under § 365(n), while trademarks were knowingly omitted. Under the maxim of *expressio unius est exclusio alterious* the expression of one thing is the exclusion of other things, *see, e.g., United States v. Hernandez-Ferrer*, 599 F.3d 63, 67–68 (1st Cir. 2010) the omission of trademarks from the definition of intellectual property in § 101(35A) indicates that Congress did not intend for them to be treated the same as the six identified categories. Therefore, Mission does not retain rights to the Debtor's trademarks and logos post-rejection.

VI. CONCLUSION

For the reasons stated above, the Court shall enter a separate order granting the Motion. This opinion constitutes the Court's findings of fact and conclusions of law in accordance with Fed. R. Bankr. P. 7052.

APPENDIX E

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE

Bk. No. 15-11400-JMD
Chapter 11

TEMPNOLOGY, LLC,

Debtor,

ORDER OF THE COURT

Hearing Date:	10/2/2015
Nature of Proceeding:	Doc# 35 Doc# 35 Omnibus Motion to Reject Executory Contracts Nunc Pro Tunc to the Petition date with Delco Illuminacio y Compementos, Trainers Choice, UK Sports Product, CAI Marketing Group, Hyman Intl, CIA Global Group Ltd, Yija International Trade Group, Cool Canuck, Mission Product Holdings, Ryan Drew, Justin Cupps, SKS Trade, LHR de Mexico, Perennial Sales Filed by Debtor
Outcome of Hearing:	The motion to reject the contract of Mission Product Holdings pursuant to 11 U.S.C. § 365(a) is granted and

the contract is rejected as of the petition date subject to Mission Product Holdings' election to preserve its rights under 11 U.S.C. § 365(n).

IT IS SO ORDERED:

/s/ J. Michael Deasy 10/2/2015
J. Michael Deasy
Bankruptcy Judge

APPENDIX F

11 U.S.C.A. § 365

§ 365. Executory contracts and unexpired leases

(a) Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.

(b)

(1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee—

(A) cures, or provides adequate assurance that the trustee will promptly cure, such default other than a default that is a breach of a provision relating to the satisfaction of any provision (other than a penalty rate or penalty provision) relating to a default arising from any failure to perform nonmonetary obligations under an unexpired lease of real property, if it is impossible for the trustee to cure such default by performing nonmonetary acts at and after the time of assumption, except that if such default arises from a failure to operate in accordance with a nonresidential real property lease, then such default shall be cured by performance at and after the time of assumption in accordance with such lease, and pecuniary losses resulting from such default shall be compensated in accordance with the provisions of this paragraph;

(B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and

(C) provides adequate assurance of future performance under such contract or lease.

(2) Paragraph (1) of this subsection does not apply to a default that is a breach of a provision relating to—

(A) the insolvency or financial condition of the debtor at any time before the closing of the case;

(B) the commencement of a case under this title;

(C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement; or

(D) the satisfaction of any penalty rate or penalty provision relating to a default arising from any failure by the debtor to perform nonmonetary obligations under the executory contract or unexpired lease.

(3) For the purposes of paragraph (1) of this subsection and paragraph (2)(B) of subsection (f), adequate assurance of future performance of a lease of real property in a shopping center includes adequate assurance—

(A) of the source of rent and other consideration due under such lease, and in the case of an assignment, that the financial condition and operating performance of the proposed assignee

and its guarantors, if any, shall be similar to the financial condition and operating performance of the debtor and its guarantors, if any, as of the time the debtor became the lessee under the lease;

(B) that any percentage rent due under such lease will not decline substantially;

(C) that assumption or assignment of such lease is subject to all the provisions thereof, including (but not limited to) provisions such as a radius, location, use, or exclusivity provision, and will not breach any such provision contained in any other lease, financing agreement, or master agreement relating to such shopping center; and

(D) that assumption or assignment of such lease will not disrupt any tenant mix or balance in such shopping center.

(4) Notwithstanding any other provision of this section, if there has been a default in an unexpired lease of the debtor, other than a default of a kind specified in paragraph (2) of this subsection, the trustee may not require a lessor to provide services or supplies incidental to such lease before assumption of such lease unless the lessor is compensated under the terms of such lease for any services and supplies provided under such lease before assumption of such lease.

(c) The trustee may not assume or assign any executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if—

(1)

(A) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and

(B) such party does not consent to such assumption or assignment; or

(2) such contract is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor, or to issue a security of the debtor; or

(3) such lease is of nonresidential real property and has been terminated under applicable nonbankruptcy law prior to the order for relief.

(d)

(1) In a case under chapter 7 of this title, if the trustee does not assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor within 60 days after the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such contract or lease is deemed rejected.

(2) In a case under chapter 9, 11, 12, or 13 of this title, the trustee may assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor at any time before the confirmation of a plan but the court, on the request of any party to such contract

or lease, may order the trustee to determine within a specified period of time whether to assume or reject such contract or lease.

(3) The trustee shall timely perform all the obligations of the debtor, except those specified in section 365(b)(2), arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected, notwithstanding section 503(b)(1) of this title. The court may extend, for cause, the time for performance of any such obligation that arises within 60 days after the date of the order for relief, but the time for performance shall not be extended beyond such 60-day period. This subsection shall not be deemed to affect the trustee's obligations under the provisions of subsection (b) or (f) of this section. Acceptance of any such performance does not constitute waiver or relinquishment of the lessor's rights under such lease or under this title.

(4)

(A) Subject to subparagraph (B), an unexpired lease of nonresidential real property under which the debtor is the lessee shall be deemed rejected, and the trustee shall immediately surrender that nonresidential real property to the lessor, if the trustee does not assume or reject the unexpired lease by the earlier of—

(i) the date that is 120 days after the date of the order for relief; or

(ii) the date of the entry of an order confirming a plan.

(B)

(i) The court may extend the period determined under subparagraph (A), prior to the expiration of the 120-day period, for 90 days on the motion of the trustee or lessor for cause.

(ii) If the court grants an extension under clause (i), the court may grant a subsequent extension only upon prior written consent of the lessor in each instance.

(5) The trustee shall timely perform all of the obligations of the debtor, except those specified in section 365(b)(2), first arising from or after 60 days after the order for relief in a case under chapter 11 of this title under an unexpired lease of personal property (other than personal property leased to an individual primarily for personal, family, or household purposes), until such lease is assumed or rejected notwithstanding section 503(b)(1) of this title, unless the court, after notice and a hearing and based on the equities of the case, orders otherwise with respect to the obligations or timely performance thereof. This subsection shall not be deemed to affect the trustee's obligations under the provisions of subsection (b) or (f). Acceptance of any such performance does not constitute waiver or relinquishment of the lessor's rights under such lease or under this title.

(e)

(1) Notwithstanding a provision in an executory contract or unexpired lease, or in applicable law, an executory contract or unexpired lease of the debtor may not be terminated or modified, and any right

or obligation under such contract or lease may not be terminated or modified, at any time after the commencement of the case solely because of a provision in such contract or lease that is conditioned on—

(A) the insolvency or financial condition of the debtor at any time before the closing of the case;

(B) the commencement of a case under this title; or

(C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement.

(2) Paragraph (1) of this subsection does not apply to an executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if—

(A)

(i) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to the trustee or to an assignee of such contract or lease, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and

(ii) such party does not consent to such assumption or assignment; or

(B) such contract is a contract to make a loan, or extend other debt financing or financial ac-

commodations, to or for the benefit of the debtor, or to issue a security of the debtor.

(f)

(1) Except as provided in subsections (b) and (c) of this section, notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law, that prohibits, restricts, or conditions the assignment of such contract or lease, the trustee may assign such contract or lease under paragraph (2) of this subsection.

(2) The trustee may assign an executory contract or unexpired lease of the debtor only if—

(A) the trustee assumes such contract or lease in accordance with the provisions of this section; and

(B) adequate assurance of future performance by the assignee of such contract or lease is provided, whether or not there has been a default in such contract or lease.

(3) Notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law that terminates or modifies, or permits a party other than the debtor to terminate or modify, such contract or lease or a right or obligation under such contract or lease on account of an assignment of such contract or lease, such contract, lease, right, or obligation may not be terminated or modified under such provision because of the assumption or assignment of such contract or lease by the trustee.

(g) Except as provided in subsections (h)(2) and (i)(2) of this section, the rejection of an executory contract or

unexpired lease of the debtor constitutes a breach of such contract or lease—

(1) if such contract or lease has not been assumed under this section or under a plan confirmed under chapter 9, 11, 12, or 13 of this title, immediately before the date of the filing of the petition; or

(2) if such contract or lease has been assumed under this section or under a plan confirmed under chapter 9, 11, 12, or 13 of this title—

(A) if before such rejection the case has not been converted under section 1112, 1208, or 1307 of this title, at the time of such rejection; or

(B) if before such rejection the case has been converted under section 1112, 1208, or 1307 of this title—

(i) immediately before the date of such conversion, if such contract or lease was assumed before such conversion; or

(ii) at the time of such rejection, if such contract or lease was assumed after such conversion.

(h)

(1)

(A) If the trustee rejects an unexpired lease of real property under which the debtor is the lessor and—

(i) if the rejection by the trustee amounts to such a breach as would entitle the lessee to treat such lease as terminated by virtue of its terms, applicable nonbankruptcy law,

or any agreement made by the lessee, then the lessee under such lease may treat such lease as terminated by the rejection; or

(ii) if the term of such lease has commenced, the lessee may retain its rights under such lease (including rights such as those relating to the amount and timing of payment of rent and other amounts payable by the lessee and any right of use, possession, quiet enjoyment, subletting, assignment, or hypothecation) that are in or appurtenant to the real property for the balance of the term of such lease and for any renewal or extension of such rights to the extent that such rights are enforceable under applicable nonbankruptcy law.

(B) If the lessee retains its rights under subparagraph (A)(ii), the lessee may offset against the rent reserved under such lease for the balance of the term after the date of the rejection of such lease and for the term of any renewal or extension of such lease, the value of any damage caused by the nonperformance after the date of such rejection, of any obligation of the debtor under such lease, but the lessee shall not have any other right against the estate or the debtor on account of any damage occurring after such date caused by such nonperformance.

(C) The rejection of a lease of real property in a shopping center with respect to which the lessee elects to retain its rights under subparagraph (A)(ii) does not affect the enforceability under applicable nonbankruptcy law of any

provision in the lease pertaining to radius, location, use, exclusivity, or tenant mix or balance.

(D) In this paragraph, "lessee" includes any successor, assign, or mortgagee permitted under the terms of such lease.

(2)

(A) If the trustee rejects a timeshare interest under a timeshare plan under which the debtor is the timeshare interest seller and—

(i) if the rejection amounts to such a breach as would entitle the timeshare interest purchaser to treat the timeshare plan as terminated under its terms, applicable nonbankruptcy law, or any agreement made by timeshare interest purchaser, the timeshare interest purchaser under the timeshare plan may treat the timeshare plan as terminated by such rejection; or

(ii) if the term of such timeshare interest has commenced, then the timeshare interest purchaser may retain its rights in such timeshare interest for the balance of such term and for any term of renewal or extension of such timeshare interest to the extent that such rights are enforceable under applicable nonbankruptcy law.

(B) If the timeshare interest purchaser retains its rights under subparagraph (A), such timeshare interest purchaser may offset against the moneys due for such timeshare interest for the balance of the term after the date of the rejection of such timeshare interest, and the term of any renewal or extension of such

timeshare interest, the value of any damage caused by the nonperformance after the date of such rejection, of any obligation of the debtor under such timeshare plan, but the timeshare interest purchaser shall not have any right against the estate or the debtor on account of any damage occurring after such date caused by such nonperformance.

(i)

(1) If the trustee rejects an executory contract of the debtor for the sale of real property or for the sale of a timeshare interest under a timeshare plan, under which the purchaser is in possession, such purchaser may treat such contract as terminated, or, in the alternative, may remain in possession of such real property or timeshare interest.

(2) If such purchaser remains in possession—

(A) such purchaser shall continue to make all payments due under such contract, but may,[1] offset against such payments any damages occurring after the date of the rejection of such contract caused by the nonperformance of any obligation of the debtor after such date, but such purchaser does not have any rights against the estate on account of any damages arising after such date from such rejection, other than such offset; and

(B) the trustee shall deliver title to such purchaser in accordance with the provisions of such contract, but is relieved of all other obligations to perform under such contract.

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[1] So in original. The comma probably should not appear.

(j) A purchaser that treats an executory contract as terminated under subsection (i) of this section, or a party whose executory contract to purchase real property from the debtor is rejected and under which such party is not in possession, has a lien on the interest of the debtor in such property for the recovery of any portion of the purchase price that such purchaser or party has paid.

(k) Assignment by the trustee to an entity of a contract or lease assumed under this section relieves the trustee and the estate from any liability for any breach of such contract or lease occurring after such assignment.

(l) If an unexpired lease under which the debtor is the lessee is assigned pursuant to this section, the lessor of the property may require a deposit or other security for the performance of the debtor's obligations under the lease substantially the same as would have been required by the landlord upon the initial leasing to a similar tenant.

(m) For purposes of this section 365 and sections 541(b)(2) and 362(b)(10), leases of real property shall include any rental agreement to use real property.

(n)

(1) If the trustee rejects an executory contract under which the debtor is a licensor of a right to intellectual property, the licensee under such contract may elect—

(A) to treat such contract as terminated by such rejection if such rejection by the trustee amounts to such a breach as would entitle the licensee to treat such contract as terminated by virtue of its own terms, applicable nonbank-

ruptcy law, or an agreement made by the licensee with another entity; or

(B) to retain its rights (including a right to enforce any exclusivity provision of such contract, but excluding any other right under applicable nonbankruptcy law to specific performance of such contract) under such contract and under any agreement supplementary to such contract, to such intellectual property (including any embodiment of such intellectual property to the extent protected by applicable nonbankruptcy law), as such rights existed immediately before the case commenced, for—

(i) the duration of such contract; and

(ii) any period for which such contract may be extended by the licensee as of right under applicable nonbankruptcy law.

(2) If the licensee elects to retain its rights, as described in paragraph (1)(B) of this subsection, under such contract—

(A) the trustee shall allow the licensee to exercise such rights;

(B) the licensee shall make all royalty payments due under such contract for the duration of such contract and for any period described in paragraph (1)(B) of this subsection for which the licensee extends such contract; and

(C) the licensee shall be deemed to waive—

(i) any right of setoff it may have with respect to such contract under this title or applicable nonbankruptcy law; and

(ii) any claim allowable under section 503(b) of this title arising from the performance of such contract.

(3) If the licensee elects to retain its rights, as described in paragraph (1)(B) of this subsection, then on the written request of the licensee the trustee shall—

(A) to the extent provided in such contract, or any agreement supplementary to such contract, provide to the licensee any intellectual property (including such embodiment) held by the trustee; and

(B) not interfere with the rights of the licensee as provided in such contract, or any agreement supplementary to such contract, to such intellectual property (including such embodiment) including any right to obtain such intellectual property (or such embodiment) from another entity.

(4) Unless and until the trustee rejects such contract, on the written request of the licensee the trustee shall—

(A) to the extent provided in such contract or any agreement supplementary to such contract—

(i) perform such contract; or

(ii) provide to the licensee such intellectual property (including any embodiment of such intellectual property to the extent protected by applicable nonbankruptcy law) held by the trustee; and

(B) not interfere with the rights of the licensee as provided in such contract, or any agreement supplementary to such contract, to such intellectual property (including such embodiment), including any right to obtain such intellectual property (or such embodiment) from another entity.

(o) In a case under chapter 11 of this title, the trustee shall be deemed to have assumed (consistent with the debtor's other obligations under section 507), and shall immediately cure any deficit under, any commitment by the debtor to a Federal depository institutions regulatory agency (or predecessor to such agency) to maintain the capital of an insured depository institution, and any claim for a subsequent breach of the obligations thereunder shall be entitled to priority under section 507. This subsection shall not extend any commitment that would otherwise be terminated by any act of such an agency.

(p)

(1) If a lease of personal property is rejected or not timely assumed by the trustee under subsection (d), the leased property is no longer property of the estate and the stay under section 362(a) is automatically terminated.

(2)

(A) If the debtor in a case under chapter 7 is an individual, the debtor may notify the creditor in writing that the debtor desires to assume the lease. Upon being so notified, the creditor may, at its option, notify the debtor that it is willing to have the lease assumed by the debtor and may condition such assumption on cure of

any outstanding default on terms set by the contract.

(B) If, not later than 30 days after notice is provided under subparagraph (A), the debtor notifies the lessor in writing that the lease is assumed, the liability under the lease will be assumed by the debtor and not by the estate.

(C) The stay under section 362 and the injunction under section 524(a) (2) shall not be violated by notification of the debtor and negotiation of cure under this subsection.

(3) In a case under chapter 11 in which the debtor is an individual and in a case under chapter 13, if the debtor is the lessee with respect to personal property and the lease is not assumed in the plan confirmed by the court, the lease is deemed rejected as of the conclusion of the hearing on confirmation. If the lease is rejected, the stay under section 362 and any stay under section 1301 is automatically terminated with respect to the property subject to the lease.

APPENDIX G

CO-MARKETING AND DISTRIBUTION AGREEMENT

This Co-Marketing, Sourcing and Distribution Agreement (this "Agreement"), is made effective as of November 21, 2012 ("Effective Date"), by and between Tempnology, LLC d/b/a Coolcore ("***CC***") and Mission Product Holdings, Inc.("***MP***").

WITNESSETH :

WHEREAS, CC and MP have executed a Binding Term Sheet dated as of November 21, 2012 (the "Term Sheet") in which the parties outlined key terms for an arrangement related to product sourcing, co-marketing and distribution of certain textile-based cooling products produced by or through CC.

WHEREAS, the Term Sheet anticipates that the parties will negotiate and agree upon a definitive agreement that will supersede the Term Sheet and the parties desire to do so; and

NOW, THEREFORE, in consideration of the mutual agreements set forth herein, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties do hereby agree as follows:

1) **Territory:**

   A) During the term of this Agreement and upon the terms and conditions set forth herein (including without limitation the terms of Sections 5 and 6 hereof), with respect to the Cooling Accessories (as defined below) MP will have, and CC hereby

grants MP, exclusive distribution rights within the United States and first rights of notice and of refusal as further defined below in this paragraph on exclusive distribution rights in certain other countries, excluding the specific countries identified in the License and Distribution agreement dated as of January 21, 2013 (the "ReYs Agreement") between CC and Qingdao Rey.S Culture and Media Company ("ReYs") — namely, the countries of China, Japan, Taiwan, Hong Kong, Korea, Singapore, Malaysia, Indonesia, Philippines, Thailand and Vietnam (the "ReYs Territories"). The United States as well as such other countries and territories that MP acquires exclusive distribution rights to pursuant to its first rights of refusal and notice hereunder are referred to collectively as the "Exclusive Territory". For the avoidance of doubt, during the term of the ReYs Agreement, ReYs has the exclusive right to sell CC's Cooling Accessories under the Coolcore trademark in the ReYs Territories. For the purposes of this Agreement, the term "Cooling Accessories" shall mean products of the specific types listed on Exhibit A hereto manufactured by or on behalf of CC and additional products that are hereafter developed by CC that are added to the term Cooling Accessories pursuant to the terms of Section 13 hereof (such additional products being sometimes herein referred to as "Cooling Accessory Derivatives" if they are not substantially distinct from the items on Exhibit A and "New

Products" if they are substantially distinct from the items on Exhibit A, it being understood that both Cooling Accessory Derivatives and New Products shall be deemed Cooling Accessories hereunder).

B) For clarity, it is expressly understood that MP shall have the right to sell Cooling Accessories throughout the world, and shall have exclusive rights (consistent with the Product Exclusivity provisions of Sections 5 and 6 below) in the Exclusive Territory. CC shall inform MP prior to agreeing to sell any Cooling Accessories (directly or indirectly) in any territory outside the United States, excluding (for the term of the ReYs Agreement only) the ReYs Territories; provided that CC shall inform MP of any pending renewals and renegotiations of the ReYs Agreement and the associated terms of any renewal or renegotiation shall be treated in the same manner as any other "International Term Sheet" (as such term is defined below). It is, however, expressly understood and agreed that, at no time in the future, will ReYs be classified as a "Sports Distributor" (as such term is defined below) based on the ReYs Agreement for the purposes of the right of first refusal set forth below and therefore MP shall only be entitled to a right of first notice with respect thereto as provided for under Subsection 1(D) hereof.

* * *

2) Term:

The initial term of this Agreement will commence upon the Effective Date and expire on July 1, 2016 (the "Initial Term"). Following the Initial Term, the Agreement will automatically renew (subject to the parties' termination rights specified below) for additional one-year periods (each a "Renewal Term") from July 2 of the then-current calendar year until July 1 of the following calendar year. Each such yearly period (whether during the Initial Term or a Renewal Term) is referred to herein as a "Contract Year," except that the first Contract Year will run from the Execution Date until July 1, 2014. The Initial Term and any Renewal Terms are together referred to as the "Term".

3) **Termination:**

Either party may terminate this Agreement without cause by providing written notice during May or June of any Contract Year, in which case the Agreement will terminate as of the last day of the second full Contract Year following timely notice of termination. For example, a termination notice delivered on June 1, 2014 would result in an effective date of termination of July 1, 2016. Notwithstanding the foregoing, and except as otherwise provided herein, either one of the parties may terminate this Agreement following the commission by the other party of a breach of a material term hereof (excluding alleged breaches by MP in the nature of nonpayment, which are subject to termination pursuant to Section 3(i) below only), after written notification to the other party that it shall have 90 days to remedy such

breach. If such breach is not remedied or cured within the 90-day period, the aggrieved party may terminate this Agreement after the expiration of such cure period by written notice to the defaulting party. A breach by a party hereunder shall be deemed cured if the party alleged to have committed such breach ceases within the above specified cure period the activity which is the basis of the alleged breach. If there is a dispute as to whether a breach exists or has been cured, this Agreement shall remain in effect until such dispute is resolved pursuant to the Dispute Resolution provision below. In addition to the foregoing, (i) CC may terminate this Agreement (but not any PO's under whi undisputed amounts have been paid) if MP has failed to pay any amount in excess of $25,000 in the aggregate due under any PO (or PO's) on a timely basis and such failure continues to exist after the passage of 30 days after CC has confirmed that MP has received written notice from CC to MP of the existence of such failure (provided that if MP in good faith disputes whether payment thereof is due this Agreement shall remain in effect until such dispute is resolved pursuant to the Dispute Resolution provision below), and (ii) CC may terminate this Agreement immediately upon written notice (or if immediate termination is not permitted under applicable law, then upon the shortest notice and cure period permitted) upon the filing of a petition in bankruptcy or for reorganization under any bankruptcy, receivership, insolvency or other similar law by or against MP; or upon MP's becoming insolvent (as finally determined by a court of competent

jurisdiction) or making an assignment for benefit of creditors or taking other similar action; and (iii) MP may terminate this Agreement immediately upon written notice (or if immediate termination is not permitted under applicable law, then upon the shortest notice and cure period permitted) upon the filing of a petition in bankruptcy or for reorganization under any bankruptcy, receivership, insolvency or other similar law by or against CC or upon CC's becoming insolvent (as finally determined by a court of competent jurisdiction) or making an assignment for benefit of creditors or taking other similar action.

4) **Effect of Termination:**

In the event of any termination of this Agreement MP shall have the right to purchase, distribute and sell, in accordance with the provisions of this Agreement, and notwithstanding the termination of this Agreement, those Cooling Accessories and other products which shall have been delivered to MP or ordered by MP on or before the date of such termination for such period of time as is reasonably required by MP to sell such Cooling Accessories and other products, provided that in all events MP shall not have the right to sell any such Cooling Accessories and other products after the two-year anniversary of the effective date of such termination, provided, however, that in the event of a termination pursuant to Section 3(i) above, CC shall have no further obligation to ship any Cooling Accessories or other products to MP under any PO provided however that if MP has fully paid for all undisputed amounts

currently due under a PO (i.e., due in accordance with the timing set forth in Section 16 below) CC shall nevertheless perform its obligations under such PO. In addition, notwithstanding any termination of this Agreement MP shall have the right to purchase, distribute and sell Cooling Accessories and other products hereunder to the extent necessary to permit MP to continue to fulfill its obligations pursuant to orders from its customers that are in effect and outstanding as of the effective date of expiration or termination (for any reason) of this Agreement, provided that in all events MP shall not have the right to purchase, distribute or sell any such Cooling Accessories and other cooling products after the two-year anniversary of the effective date of such termination, provided further, however, that in the event of a termination pursuant to Section 3(i) above, CC shall have no further obligation to ship any Cooling Accessories or other products to MP under any PO provided however that if MP has fully paid for all undisputed amounts currently due under a PO CC shall nevertheless perform its obligations under such PO. The period of time following the effective date of termination during which MP exercises its rights under this Section 4 shall be referred to as the "Wind-Down Period."

5) **Product Exclusivity:**

In the Exclusive Territory, CC agrees it will not license or sell the Cooling Accessories (including any Cooling Accessory Derivatives thereof) that are designated as exclusive on Exhibit A or otherwise mutually agreed in

writing to be "Exclusive Cooling Accessories" (collectively, the "Exclusive Cooling Accessories") to anyone other than MP during the Term, with the understanding that, to the extent expressly provided in Exhibit B or otherwise expressly agreed in writing by the parties, CC has the right to sell the Cooling Accessories that are not "Exclusive Cooling Accessories" ("Non-Exclusive Cooling Accessories") to vertically integrated companies as well as customers that are not Sports Distributors or retailers in the Sporting Channel for private label or CC-labeled versions of the Cooling Accessories. MP shall have a right of first notice and refusal to distribute any Cooling Accessory Derivatives and New Products developed by CC as provided for under Section 13. Following written notification by CC of such Cooling Accessory Derivatives and New Products, MP will have forty-five (45) days to provide the terms under which it wishes to distribute such Cooling Accessory Derivatives and New Products. Any New Product that does not have the same function as an Exclusive Cooling Accessory shall be treated as a Non-Exclusive Cooling Accessory unless the parties mutually agree in writing to add it to the list of Exclusive Cooling Accessories. If MP declines to make a good faith offer to distribute such Cooling Accessory Derivatives or New Products within such 45-day period, CC shall thereafter be free (subject to all the limitations in Section 6, including without limitation, the restrictions on sale in the Sporting Channel) to sell such Cooling Accessory Derivative or New Products to any third party in any territory or country;

provided that such Cooling Accessory is not of comparable size and shape or function to any Exclusive Cooling Accessory (For example, CC would not be permitted to sell any Cooling Accessory Derivative, New Product or any other cooling product that functions as a towel, regardless of the size or shape of such product). If MP declines to make such a good faith offer, it shall not thereafter manufacture or have manufactured for it such Cooling Accessory Derivative or New Product without first providing CC with 45 days notice of the terms under which it proposes to have such Cooling Accessory Derivative or New Product manufactured and the opportunity for CC to match the terms under which MP is proposing to have such Cooling Accessory Derivative or New Product manufactured and (i) if CC agrees to match such terms in such 45 day period such Cooling Accessory Derivative or New Product shall be treated as a Cooling Accessory Derivative for all purposes hereunder and (ii) if CC does not agree to match such terms in such 45 day period and such Cooling Accessory Derivative or New Product is a woven product (as opposed to a knitted product) MP shall not be subject to the sourcing obligations under Section 14 with respect to such Cooling Accessory Derivative or New Product. If MP does make such a good faith offer within such 45-day period, CC shall consider MP's offer in good faith but will not be obligated to accept such offer; provided that if CC does not accept MP's good faith offer it shall notify MP of any third party offer subsequently received to distribute such Cooling Accessory Derivatives or New Prod-

ucts and shall provide MP with a 45-day period in which to match any third party offer for such Cooling Accessory Derivatives or New Products and MP's offer shall be deemed accepted by CC if it matches the third party offer. Should MP's offer be accepted pursuant to the foregoing, then the applicable Cooling Accessory Derivative or New Product will become a Cooling Accessory hereunder for all applicable channels and this Agreement shall be amended to reflect the terms of such offer.

6) **Distribution Exclusivity and Collaboration:**

a) In the U.S. and elsewhere in the Exclusive Territory, CC agrees it will not sell any Cooling Accessories, New Products or Cooling Accessory Derivatives, directly or indirectly, through an agent or otherwise, to any retailer or other entity in the "Sporting Channel" (as such term is hereinafter defined) throughout the Term except in compliance with the following provisions of this Section 6. In addition, both parties agree to use commercially reasonable efforts in good faith to finalize the structure, commission, plan and process associated with MP's representation of CC-branded apparel products to sporting goods and sport specialty retailers ("Sporting Channel"). So long as the parties have used such efforts, the failure to finalize same shall not constitute a breach hereof. For the avoidance of doubt, it is expressly understood that a retailer will be deemed within the Sporting Channel if fifty percent (50%) or more of such retailer's annual revenue is derived from sports and sporting goods supplies, including without limitation,

any sports-related footwear (provided, however, that if the parties are unable to determine the actual revenues of an entity, reference shall be made the applicable percentage of its product catalogue offerings) and any retailer that qualifies as being within, or outside, the Sporting Channel as of the first day on which the initial sell-in period for an applicable product commences shall be grandfathered as such for the balance of the Term. CC agrees and acknowledges that no New Product, Cooling Accessory, Cooling Accessory Derivative or other cooling product will be directly or indirectly sold or distributed by CC or any agent or contractor of CC to any retailer or other entity in the Sporting Channel in the Exclusive Territory including sporting goods and sporting specialty retailer; provided, however that (so long as any apparel and Dr Cool products are not of comparable size and shape or function to the Exclusive Cooling Accessories) the foregoing restrictions shall apply with respect to apparel and Dr Cool products only during the Restricted Period. The "Restricted Period" shall mean, with respect to Dr Cool products, the 6-month period following the date on which CC notifies MP in writing that the first such CC Dr Cool product is ready for shipping to retail distribution and, with respect to cooling products in the apparel category, the 12-month period following the date that CC notifies MP in writing that its first such cooling apparel product is ready for shipping to retail distribution. Following any such notice from CC, the parties shall work in good faith to agree upon reasonable, mutually acceptable sales success criteria, which must

be established no later than sixty (60) days prior to the date on which such products are in stock and ready for shipment to retailers. Once the parties agree upon such mutually acceptable sales success criteria this Agreement shall be amended to reflect the terms of such agreement. If, following the exercise of such good faith efforts, the parties are unable to agree upon such mutually acceptable sales success criteria within such 60 day period, CC shall be free (following the mandatory 6 or 12 month Restrictive Period specified above, which shall apply regardless of whether the parties reach mutually acceptable sales criteria) to sell such products to Sporting Channel entities without restriction under this Section 6(a) provided that if MP disputes in good faith whether CC actually exercised such good faith efforts and initiates a Dispute Resolution process as set forth below, CC's right to do so shall be suspended until the resolution of such process. If the agreed upon criteria are met by MP during the initial 6 (in the case of Dr Cool Products) and 12 (in the case of other cooling products) months of the Restricted Period (or during any extension of the Restricted Period), the Restricted Period shall be extended for an additional 6 or 12 months (as applicable). For the avoidance of doubt, the parties agree and acknowledge that the Restricted Periods may or may not run concurrently (due to different launch dates) and the extension of the Restricted Period for cooling products and in the apparel category and Dr Cool products shall be considered independently, making it possible

for the Restricted Period to be extended for one without extending the other.

b) The parties agree to use commercially reasonable efforts during the first 60-90 days of the Term to devise a mutually agreeable distribution and sales strategy for the Running Specialty Channel that specifically addresses CC apparel/socks and MP/CC baselayer and socks. Specific topics to be discussed include distribution, segmentation, and rollout/launches within the Running Specialty Channel and the Sporting Goods Channel. The Running Specialty Channel is defined as retail stores with at least 95% of sales to runners. Provided that the parties use such efforts, the failure to agree upon such a strategy shall not constitute a breach of the terms hereof.

c) In addition to and without limiting the other exclusivity requirements hereunder, it is expressly agreed that MP will have exclusivity with respect to all Cooling Accessories (including Cooling Accessory Derivatives and New Products) and other cooling products sold to or through: Lowe's Home Improvement, Home Depot, QVC, HSN, Shop NBC and Direct Response subject to the following provisions of this Section 6(c). For further clarity, neither CC nor its affiliates will be permitted to sell cooling products (including Cooling Accessories and New Products) (during the period of the Term in which MP has any exclusivity rights under Sections 5 and 6 hereof) to any of the foregoing retailers or their affiliates other than through MP. Notwithstanding the foregoing, it is agreed that CC's exclusivity obligations un-

der this Section 6(c) shall expire with respect to Dr Cool Products (so long as the Dr Cool Products are not of comparable size and shape or function to the Exclusive Cooling Accessories) 12 months following the date on which CC notifies MP in writing that the first such Dr Cool Product is ready for shipping to retail distribution and, with respect to CC's cooling products in the apparel category (so long as the cooling products are not of comparable size and shape or function to the Exclusive Cooling Accessories), the 12 months following the date that CC notifies MP in writing that its first such cooling apparel product is ready for shipping to retail distribution. Following any such notice from CC, the parties shall work in good faith to agree upon reasonable, mutually acceptable sales success criteria, which must be established no later than sixty (60) days prior to the date on which such products are in stock and ready for shipment to retailers. Once the parties agree upon such mutually acceptable sales success criteria this Agreement shall be amended to reflect the terms of such agreement. If, following the exercise of such good faith efforts, the parties are unable to agree upon such mutually acceptable sales success criteria within such 60 day period, CC shall be free (following the mandatory 12 month exclusive period specified above, which shall apply regardless of whether the parties reach mutually acceptable sales criteria) to sell those specific products (i.e., products with respect to which the parties have failed to agree upon acceptable sales success criteria) to those entities that are restricted under this Section 6(c) with-

out restriction provided that if MP disputes in good faith whether CC actually exercised such good faith efforts and initiates a Dispute Resolution process as set forth below, CC's right to do so shall be suspended until the resolution of such process. If such criteria are met by MP, the exclusivity periods specified in this paragraph sentence shall be extended for additional 12-months periods, it being understood that such extensions shall be considered independently for CC's cooling products in the apparel category and the Dr Cool products.

7) **Cooperation and Further Assurances:**

CC agrees that (i) it shall take no actions to directly or indirectly frustrate its exclusivity obligations hereunder; (ii) CC shall fully cooperate with MP to ensure that no third parties take any actions that frustrate the purposes of the exclusivity provisions herein, and (iii) CC shall take such actions as are necessary to enforce CC's intellectual property rights and contractual rights against third parties. For the avoidance of doubt, CC represents and warrants that it has the right to enter into this Agreement and that it is not subject to any agreement with any other party that conflicts with CC's obligations hereunder or which would otherwise frustrate the purposes of this Agreement. Without limiting the foregoing, CC represents and warrants that any agreement CC previously has executed with Grabber (or its affiliates) has been terminated and Grabber and its affiliates have no further rights to sell or distribute additional inventory or fulfill any product orders for any products sup-

plied directly or indirectly by or through CC or its affiliates. CC further agrees to take all actions necessary to ensure that its affiliates and any other related entities or representatives are bound by and will adhere to the terms of this Agreement.

* * *

13) New Product Development:

CC agrees to use commercially reasonable efforts to launch no fewer than 3 new products per Contract Year as Cooling Accessory Derivatives that are substantially distinct from those set forth on Exhibit A ("New Products"), as well as introduce no fewer than 2 new colors per Contract Year for all existing Cooling Accessories from the prior year portfolio ("Cooling Accessory Derivatives"). For clarity, in the event that MP and CC launch more than 3 New Products that were proposed by CC in a Contract Year, then CC's obligations to present and launch New Products in the following Contract Year shall be reduced in a corresponding manner (i.e., if the parties launch 4 New Products in a Contract Year, CC's obligation will be to launch no fewer than 2 New Products in the next Contract Year). CC agrees to use commercially reasonable efforts to update existing Cooling Accessories every 3 years. For the avoidance of doubt, the baselayer shirt, socks and yoga mat will serve as the three New Products for the first Contract Year.

* * *

15) Intellectual Property:

a) For purposes of this Agreement "Intellectual Property Right and Intellectual Property Rights" means (a) all copyright rights under the copyright laws of the United States and all other countries for the full term thereof (and including all rights accruing by virtue of bilateral or international copyright treaties and conventions), whether registered or unregistered, including, but not limited to, all renewals, extensions, reversions or restorations of copyrights now or hereafter provided for by law and all rights to make applications for copyright registrations and recordations, regardless of the medium of fixation or means of expression; (b) all rights to and under all new and useful, patentable and unpatentable inventions, discoveries, designs, technology and art, including, but not limited to, all improvements thereof and all know-how related thereto, including all letters patent and patent applications in the United States and all other countries (and all letters patent that issue therefrom) and all reissues, reexaminations, extensions, renewals, divisions and continuations (including continuations-in-part and continuing prosecution applications) thereof, for the full term thereof; (c) all statutory and common law trademark and service mark rights and the goodwill associated therewith, and all applications and registrations to issue therefrom under all intellectual property laws of the United States, each U.S. state, and all other countries for the full term and any renewals thereof

("Marks"); (d) Internet domain names and applications therefor and URLs ("Domain Names"); (e) electronic or other databases to the extent protected by intellectual property or other law in any jurisdiction; (f) all trade secrets; (g) all Confidential Information; (h) know-how; and (i) all worldwide intellectual property rights, industrial property rights, proprietary rights and common law rights, whether registered or unregistered, not otherwise included in the foregoing, including, without limitation, all trade dress, algorithms, concepts, processes, methods and protocols.

b) "CC Property" shall be defined as all products (including without limitation the Cooling Accessories), personal products, inventions, designs, discoveries, improvements, innovations, ideas, drawings, images, works of authorship, formulas, methods, techniques, concepts, configurations, compositions of matter, packaging, labeling, software applications, databases, computer programs as well as other creative content, methodologies and materials in existence prior to this Agreement (or created outside the scope of this Agreement) or developed or provided by CC hereunder and all Intellectual Property Rights with respect to any of the foregoing, excluding any materials provided by MP. It is understood and agreed that CC shall be under no obligation to share with or provide to MP any CC Property except as specifically called for under this Agreement. Excluding those

elements of the CC Property consisting of Marks, Domain Names, CC hereby grants MP and its agents and contractors a non-exclusive, irrevocable, royalty-free, fully paid-up, perpetual, worldwide, fully-transferable license, with the right to sub-license (through multiple tiers), use, reproduce, modify, and create derivative work based on and otherwise freely exploit the CC Property in any manner for the benefit of MP, its licensees and other third parties (collectively "MP Licensees"). Excluding those elements of the CC Property consisting of Marks or Domain Names or any claims relating thereto but without otherwise limiting the foregoing, (i) MP will have the right to use for any and all purposes the CC Property, including any ideas, methods, techniques, materials and information, including any Intellectual Property Rights therein, provided to or otherwise obtained by MP as a result of this Agreement, without restriction, liability or obligation and (ii) CC hereby releases MP Licensees from all claims based on CC's patent, copyright, trade dress or other Intellectual Property Rights that arose prior to this Agreement (including, notwithstanding any provision herein to the contrary, any claims relating to Marks that arose prior to this Agreement) or that arise during or after the term of this Agreement.

c) "MP Property" shall be defined as all products, personal products, inventions, designs, discoveries, improvements, innova-

tions, ideas, drawings, images, works of authorship, formulas, methods, techniques, concepts, configurations, compositions of matter, packaging, labeling, software applications, databases, computer programs as well as other creative content, methodologies and materials in existence prior to this Agreement (or created outside the scope of this Agreement) or developed or provided by MP hereunder and all Intellectual Property Rights with respect to any of the foregoing, excluding any materials provided by CC. It is understood and agreed that MP shall be under no obligation to share with or provide to CC any MP Property except as specifically called for under this Agreement. Excluding those elements of the MP Property consisting of Marks or Domain Names or any MP Property relating to any MP athletes or other talent or third party or any claims relating to any of the foregoing, (i) CC will have the right to use for any and all purposes relating to cooling products the MP Property, including any ideas, methods, techniques, materials and information and any Intellectual Property Rights therein, provided to or otherwise obtained by CC as a result of this Agreement, without restriction, liability or obligation and (ii) MP hereby releases CC Licensees from all claims based on MP's patent, copyright, trade dress or other Intellectual Property Rights that arose prior to this Agreement or, to the extent within the scope of the licenses granted herein, that arise during or after the term

of this Agreement. Further, and notwithstanding anything to the contrary set forth in this Agreement, in the event of a termination of this Agreement pursuant to Section 3(i) or (ii) CC shall negotiate in good faith with MP (for a period of not less than 90 days following any such termination) with respect to the disposition (including sale to MP or destruction) of any products that MP had ordered and that CC had manufactured. If, following such 90 day period, the parties have been unable to mutually agree upon the disposition of such products, then for a period of 6 months thereafter, CC shall have the right, using the MP Property (as previously affixed to or integrated in the products), to dispose of any products that MP had ordered and that CC had manufactured anywhere to anyone.

d) During the Term of this Agreement and the Wind-Down Period, CC grants to MP a non-exclusive, non-transferable, limited license, which shall expire upon the termination of this Agreement except as necessary to allow either party to exercise its rights during the Wind-Down Period, to use its Coolcore trademark and logo (as well as any other Marks licensed hereunder) for the limited purpose of performing its obligations hereunder, exercising its rights and promoting the purposes of this Agreement as contemplated herein, in each instance so long as not done by MP in a (i) disparaging or inaccurate manner or (ii) manner which is inconsistent with the terms of this

Agreement. MP shall comply with any written trademark guidelines that CC provides in writing in advance. In addition, each party shall have the right to review and approve all uses of its Marks by the other party, except for those pre-approved uses by MP as specified above. Neither party will create a unitary composite mark involving a Mark of the other party without the prior written approval of the other party. Each party will display trademark symbols and proprietary notices in connection with its use of the other party's Marks in connection with this Agreement as may be reasonably requested and provided by the other party. Each party acknowledges the other party's right, title, and interest in and to its Marks and agrees that all use of the other party's Marks in connection with this Agreement will inure to the benefit, and be on behalf, of the other party and neither party shall attempt to register or otherwise cancel, interfere, or contest the other party's rights in and to its intellectual property and trademarks. For avoidance of doubt, each party acknowledges that its use of the other party's Marks will not create in it, nor will it represent that it has, any right, title, or interest in or to such Marks other than the limited licenses expressly granted herein. Except as otherwise agreed, the rights granted to MP under this paragraph are granted on a worldwide, provided that MP shall not have the right to use CC's Marks in any jurisdiction within the ReYs Territory.

Notwithstanding any other provision herein, the rights granted to MP under this Section shall continue throughout the Wind Down Period.

e) It is not the parties' intention to create any jointly owned Intellectual Property Rights hereunder. Rather, the parties intend that all Intellectual Property Rights should be categorized as either MP Property or CC Property and licensed pursuant to the terms herein.

f) Each party agrees to execute or cause its agents and/or employees to execute any documents necessary or desirable to secure or perfect the other party's legal rights and worldwide ownership in such other party's Intellectual Property Rights (e.g., the CC Property in the case of CC and the MP Property in the case of MP), including, but not limited to documents relating to patent, trademark and copyright applications, transfers or assignments.

g) During the Term, MP agrees that it shall not (nor will it direct any of its agents to) attempt to reverse engineer any trade secret information relating to the proprietary chemical compositions or proprietary product weaves of CC Cooling Accessories; provided that the foregoing restriction shall not apply during any Contract Year (or for any period of time thereafter): (i) in which either party has issued a notice of termination hereunder or (ii) in which total purchases by MP of Cooling Accessories

hereunder has declined from the prior Contract Year. For the avoidance of doubt, CC recognizes that MP may require information regarding the chemical composition or proprietary product weaves of CC products, including without limitation, due to retailer or regulatory inquiries, and CC shall fully cooperate in providing such information upon MP's request.

* * *

ACCEPTED AND AGREED as of
The date first written above:

Tempnology, LLC (d/b/a Coolcore)	**Mission Product Holdings, Inc.**
By: [Signature]	By:
Name: Justin Cupps	Name: Josh Shaw
Title: President	Title: President

* * *

ACCEPTED AND AGREED as of
The date first written above:

Tempnology, LLC (d/b/a Coolcore)	**Mission Product Holdings, Inc.**
By:	By: [Signature]
Name:	Name: Josh Shaw
Title:	Title: President

* * *

No. 17-1657

In The
Supreme Court of the United States

MISSION PRODUCTS HOLDINGS, INC.,

Petitioner,

v.

TEMPNOLOGY, LLC,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether trademarks fall within the ambit of protection for "intellectual property" rights under section 365(n) of the Bankruptcy Code when Congress made a deliberate choice to exclude trademarks from the definition of "intellectual property" when it enacted section 101(35A) of the Bankruptcy Code.

2. Whether exclusive distribution rights granted under the operative Agreement survive the Debtor's rejection of the Agreement by virtue of a non-debtor's election under section 365(n) of the Bankruptcy Code.

CORPORATE DISCLOSURE STATEMENT

Respondent is Tempnology, LLC n/k/a Old Cold LLC. There are no parent corporations or publicly held companies owning 10% or more of Respondent's stock.

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent, Tempnology, LLC n/k/a Old Cold LLC, respectfully submits this response to the petition for writ of certiorari filed by Petitioner Mission Products Holdings, Inc. in this case.

INTRODUCTION

This case focuses primarily on limited trademark license rights that the Petitioner, Mission Products Holdings, Inc. ("Mission Products" or "Petitioner"), itself chose to terminate for business reasons on June 30, 2014, fifteen months before the Respondent, Tempnology, LLC (now known as Old Cold LLC) ("Old Cold") filed for bankruptcy on September 1, 2015. The unique contract between the parties provided for a "wind-down period" following the contract termination by Mission Products that ended nine months into the bankruptcy on July 1, 2016, during which Mission Products made no use of the trademark (as it also had not done for eighteen months beforehand). In the bankruptcy, Old Cold rejected the contract as permitted under 11 U.S.C. § 365(a), thereby absolving it of further obligations to police the trademark. In what has become an academic exercise that cannot concretely affect these parties (because Mission Products voluntarily terminated its own rights long ago), Petitioner's dogged pursuit of litigation resulted in a first-ever circuit split between just the First and Seventh

Circuits regarding the effects of rejection of a trademark license under Bankruptcy Code section 365.[1]

Here the First Circuit properly recognized that trademarks are different from other intellectual property rights, and that the Bankruptcy Code's strong policy of permitting a debtor to free itself of ongoing obligations under a contract as embodied in section 365(a) and the right to reject such obligations applies to the burden of policing trademarks – something to which the Seventh Circuit had given shorter shrift. While there is therefore a recent and sole circuit split on the issue, it is premature for the U.S. Supreme Court to address this nascent split, and in any event this is not the right case in which to do so, for several reasons.

First, the Petition overstates the depth and duration of the circuit split by attempting to recast the issue as implicating all types of intellectual property rights including patents. That way, according to the Petition, a 1985 Fourth Circuit decision on patent rights, *Lubrizol Enters., Inc. v. Richmond Metal Finishers, Inc.*, 756 F.2d 1043 (4th Cir. 1985), gets swept into the calculus. But not only is *Lubrizol* a patent case, the issues it raised were squarely addressed by Congress and put to bed in 1988 by the enactment of 11 U.S.C. § 365(n)(1).

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[1] All references to a section are to sections under title 11 of the United States Code (the "Bankruptcy Code") unless otherwise noted.

That brings us to the second, perhaps more fundamental, reason that the Court should deny the Petition: Congressional intent. In passing section 365(n)(1) to address issues raised by the decision in *Lubrizol*, Congress expressly considered the impact of rejection under the then-new statute on other intellectual property rights such as patents, but deliberately chose not to include trademarks at that time, given the disparate and complex issues involving trademarks. Instead, the legislative history reflects that Congress intended to leave issues involving trademarks for further development and evolution in the courts. At the Court of Appeals level, that exploration has only just begun. In the three decades since the enactment of section 365(n)(1), this issue has only arisen a handful of times and only twice at the Court of Appeals. Until the issues are further fleshed out by other Courts of Appeals, it would be premature for the United States Supreme Court to step in and terminate the judicial developments that Congress envisioned.

Third, even assuming a single split of circuit authority warrants the attention of this Court, the present case is not the proper vehicle for the Court to resolve these complex issues. This case is a particularly poor choice for the Supreme Court to forestall either bankruptcy court evolution of the law or appropriate legislative action to try to create new standards, because key points such as the burdens on the debtor of the continued policing of the trademark, the debtor's balancing of those costs versus any benefits derived from that effort, and the impact of a

"stranding" of the trademark were the mark to become "abandoned," were not litigated on a developed evidentiary record below. If the Court were to take up this abstract question on such a thin evidentiary record, that would likely lead either to new standards based largely on speculation, or a further remand for fleshing out the evidence. Far better to await further development of the issues involving trademark licenses in courts as Congress expressly intended or to allow Congress to address the issue as it also contemplated.

Finally, Mission Products also seeks to revive its separate claim regarding an exclusive distributorship by re-packaging that claim as though it were a necessary incident of a patent right, an attempt that the First Circuit rightly rejected as unsupportable. That argument does not, itself, present any circuit conflict or other ground for this Court's special review on certiorari.

For all these reasons, Old Cold urges the Court to deny the Petition and allow these issues to be resolved by the bankruptcy courts on a case-by-case basis or Congress on a legislative level.

REASONS FOR DENYING PETITION

1. The Split of Authority Is Neither Deep Nor Long-Standing.

For the first time in thirty years – after Congress passed section 365(n) in response to a Fourth Circuit

patent case in *Lubrizol*, a new circuit conflict has arisen regarding the impact on trademarks of rejection of a contract in bankruptcy. That nascent conflict has yet to be fleshed out in other circuits. The Petition and amicus briefs inflate the scope of the present case by suggesting that it has an impact on all intellectual property in bankruptcy. On the contrary, that wider landscape was resolved by Congress when it enacted section 365(n), from which it carefully carved out trademarks for further evolution in the courts. That evolution has largely just begun after thirty years, with the First Circuit decision here.

As the Seventh Circuit acknowledged in *Sunbeam Products, Inc. v. Chicago Manufacturing, LLC*, 686 F.3d 372 (7th Cir. 2012), the split of authority does not date back thirty-plus years to *Lubrizol*, nor is it wide-ranging:

> We need to determine whether *Lubrizol* correctly understood § 365(g), which specifies the consequences of a rejection under § 365(a). *No other court of appeals has agreed with Lubrizol – or for that matter disagreed with it. Id.*, at 377 (emphasis supplied).

Now the First Circuit has also weighed in, but no other circuit court has addressed the issue head on. The bankruptcy courts that have done so have acted as intended by Congress in making equitable rulings based on the cases before them. *See, e.g., In re Chipwich, Inc.*, 54 B.R. 427, 431 (Bankr. S.D.N.Y. 1985) (stating that rejection of licenses by licensor deprives licensee of right to use trademark but licensee has

allowable claim for damages for breach of contract). *In re Dynamic Tooling Sys., Inc.*, 349 B.R. 847, 856 (Bankr. D. Kan. 2006). *Raima UK Ltd. v. Centura Software Corp. (In re Centura Software Corp.)*, 281 B.R. 660, 670 (Bankr. N.D. Cal. 2002); *but see In re Crumbs Bake Shop, Inc.*, 522 B.R. 766 (Bankr. D.N.J. 2014). What the Petitioner and *amici* characterize as "confusion" engendered by this process is nothing more than these various courts making rulings on the facts before them. The parties further urge this Court to provide "equitable treatment" of trademarks as comporting with Congressional intent and the fundamental principles of bankruptcy law. But that is exactly what has occurred in the episodic cases addressing this issue.

Trademarks are deeply different from other forms of intellectual property subject to the application of section 365(n), because the value inheres in conveying a message of continued monitoring and quality control by the originator (and not just the licensees). How that plays out in bankruptcy, when the debtor is unwilling or unable to perform that role, is a conundrum that Congress recognized when it carved out trademarks for further study and development. This intent is something the Seventh Circuit gave short shrift to, and the First Circuit is the first court of appeals to fully recognize. At a minimum the issue should be further developed in the bankruptcy and appellate courts before this Court considers the issue.

2. Congress Acted Purposefully in Enacting Section 365(n) in the Wake of the Fourth Circuit's *Lubrizol* Decision.

In the aftermath of *Lubrizol*, Congress enacted a careful balancing of rights and obligations of debtors and their "intellectual property" licensees as "intellectual property" is defined in the Bankruptcy Code. Congress granted licensees an election to continue to use licensed patents and copyrights while affording debtor licensors the right to continue to collect royalties notwithstanding a licensees' damages from breach of contract.

While the Petitioner and *amici* attempt to expand the impact of the First Circuit's holding to subsume not merely trademarks but all forms of intellectual property rights, those attempts misstate the relevant law and the First Circuit's holding. Contrary to these positions, the present case does not implicate broader issues that create "uncertainty over significant commercial transactions that are central to our nation's system for encouraging and rewarding innovation."

The plain language of section 365(n) excludes trademarks because of the definition of intellectual property at 11 U.S.C. § 101(35A). The statute is clear and does not include trademarks. *See, e.g., In re Old Carco LLC*, 406 B.R. 180, 211 (Bankr. S.D.N.Y. 2009) ("Trademarks are not 'intellectual property' under the Bankruptcy Code."); *In re Dynamic Tooling Sys., Inc.*, 349 B.R. 847, 856 (Bankr. D. Kan. 2006)

("[T]rademarks and service marks [are] not protected by § 365(n) at all because trademarks are not 'intellectual property' as that term is defined in the Code. . . ."); *In re HQ Global Holdings, Inc.*, 290 B.R. 507, 513 (Bankr. D. Del. 2003) (excluding trade names, trademarks, and other proprietary marks from the definition of "intellectual property").

Courts should consider legislative history to resolve statutory ambiguity if the language of a statute is not clear, but when a statute is clear there is no need to do so. *Toibb v. Radloff*, 501 U.S. 157, 162 (1991). A court may only hold contrary to an unambiguous statute when there is clearly expressed legislative intent that contradicts the plain language of the statute. *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). While the statute is clear and unambiguous and therefore this Court need not resort to a review of legislative history, the legislative history of section 365(n) is instructive on this narrow issue. That history shows a clear intention that Congress would allow bankruptcy courts to develop law for the "equitable treatment" of trademark licenses in bankruptcy cases to inform, as necessary, further Congressional action should Congress opt to revisit the issue at a later date.

One of the *amici*, the International Trademark Association ("INTA"), itself has proposed that the treatment of trademarks under section 365(n) is best addressed by Congressional amendment. In 2012, INTA drafted Board Resolutions sponsored by its U.S. Legislation Subcommittee that proposed explicitly

that Congress amend section 365(n) to include trademark licenses within its post-rejection protection for licensees. The INTA resolution proposed a continuing obligation on a debtor-licensor to comply with any monitoring and quality control obligations under such license. Congress can achieve through legislative action what this Court cannot – amend section 365(n) to uniformly protect the rights of both debtors and licensees to trademark licenses.

Petitioner and *amici* each parrot the language in *Sunbeam* that "an omission is just an omission" 686 F.3d at 376 when urging the Court to reach a uniform judicial resolution of the post-rejection rights under section 365(n). But that position is in direct conflict with the legislative history cited in the briefs submitted to the Court that make it clear that the "omission" of trademarks was thoughtful and reflected Congressional intent that bankruptcy courts develop the law.

In this case, after reviewing the subject distribution agreement and the plain meaning of section 365, the bankruptcy court, the bankruptcy appellate panel and the First Circuit, correctly determined, that Petitioner retained all of the intellectual property rights under the agreement that were expressly protected by section 365(n) – i.e., rights to exploit patents and copyrights – but that any rights in trademarks that Petitioner might once have exploited under the agreement, were not protected under section 365(n).

The issue then becomes, what, if any, rights does a licensee in Petitioner's position retain post-rejection of

its trademark license by a debtor-licensor. Petitioner urges the Court to adopt the reasoning in *Sunbeam* that a licensee retains whatever rights it has under the controlling agreement but the debtor is relieved of the duty of specific performance post-rejection. The First Circuit recognized that, given the fundamental public-facing nature and quality control that define the maintenance and exploitation of trademarks, imposing this on-going burden on a debtor in bankruptcy is at odds with the essence of bankruptcy's reorganization principles. At the heart of the First Circuit's ruling is a fundamental understanding that the purpose of rejection under section 365 is to "release the debtor's estate from burdensome obligations that can impede a successful reorganization." *See NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 528, 104 S.Ct. 1188, 79 L.Ed.2d 482 (1984). Determination of the scope and cost of these on-going performance obligations on a debtor impose delays and costs on a bankruptcy case that will be difficult to measure and may likely undermine effective reorganization or sales under the Bankruptcy Code.

Trademarks play no discernible role in encouraging or rewarding innovation in the same way that, for example, patents do. Trademarks are fundamentally different than patents, copyrights and trade secrets. Trademarks protect vastly different works than copyrights and patents. The distinction between trademarks and other types of intellectual property originates from theoretical, foundational reasons for protecting each type of intellectual property. Patents

and copyrights protect authors and inventors in order to facilitate innovation. *Groeneveld Transp. Efficiency, Inc. v. Lubecore Int'l, Inc.*, 730 F.3d 494, 512 (6th Cir. 2013). Alternatively, trademarks focus on marketplace integrity and protect consumers who rely upon trademarks when purchasing goods and services. *See* 15 U.S.C. § 1127 (2012).

The United States Supreme Court specified that trademarks "identify the origin or ownership of the article to which it is affixed." *Hanover Star Milling Co. v. Metcalf*, 240 U.S. 403, 412 (1916). Trademarks protect the integrity of the marketplace with no regard for the creators of intellectual property. *Groeneveld*, 730 F.3d at 512. Trademarks protect the goodwill of a particular trader from imitators passing another product or service off as the product protected by the trademark. *United Drug Co. v. Theodore Rectanus Co.*, 248 U.S. 90, 97 (1918). Congress did not intend for trademarks to promote creativity because a trademark's protection lasts perpetually, whereas copyrights and patents create a monopoly limited to a specific number of years. *Id.*

A trademark brands a product to give that product the imprimatur of legitimacy and consistency of quality in the market place. Trademarks are not, however, goods sold into the market as urged by the Petitioner and *amici*. Trademarks are not property rights like patents or copyrights, that is, property rights created by federal law held in the hands of and exploited by the licensee. Instead, trademarks are intended to provide consumer protection – with unitary ownership held by

the licensor to ensure quality control in the market of the branded product.

Further, in enacting section 365(n), Congress acted consistently with the manner in which it has addressed numerous other executory contract rights – creating special sets of rights unique to bankruptcy that carefully balance the debtor's right to reorganize against the rights of non-debtor contract counterparties. For example, non-debtor tenants under real estate leases are afforded statutory rights to use the leasehold, while losing rights to compel debtors to maintain or improve the property. *See* § 365(h)(1)(A). Non-debtor tenants in shopping center leases are likewise entitled to retain the leasehold, but are also entitled to enforce radius and tenant mix restrictions. *See* § 365(h)(1)(C). Non-debtor buyers of timeshares are permitted by statute to retain their right to use the timeshare. *See* § 365(h)(2)(A). Non-debtor buyers of real property are afforded rights of specific performance on contract rejection and, in addition, are afforded a lien on the property to secure any prepaid deposits if the buyer elects to treat the lease as terminated. *See* § 365(i)(1) and § 365(j). Non-debtor parties to collective bargaining agreements are afforded special rights and a higher legal standard for rejection. *See* § 1113. In enacting these provisions, Congress understood how to balance the respective rights and obligations of parties to executory contracts upon rejection. Section 365(n) is further evidence of Congress' capacity to strike that balance.

It is well settled that, after rejecting a contract, a debtor is not subject to an order of specific performance. *See NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 531, 104 S.Ct. 1188, 79 L.Ed.2d 482 (1984). Should the Court grant the Petition and thereafter find in favor of the Petitioner, the Court will disturb settled rights granted by Congress respecting a debtor's right to reject executory contracts. The result of such a finding, permitting non-debtor parties to retain rights of specific performance post-rejection, renders section 365(n) superfluous. Moreover, congressionally crafted benefits for debtors, including a debtor's ability to continue to collect royalties from licensees under section 365(n), would be illusory. Indeed, had Congress intended that result, it could have excluded all intellectual property licenses from the definition of executory contracts eliminating a debtor's option of rejecting such contracts. This is not the case. If the Petitioner is correct, section 365 could be reduced to a single provision: no matter the substance or subject of an executory contract for exploitation of intellectual property, upon rejection, the non-debtor party has a claim for prepetition breach, thereafter retains whatever rights it has under the contract and, if necessary, can compel specific performance by the debtor. The logic leads to an absurd result directly at odds with the fundamental rehabilitative nature of reorganization under the Bankruptcy Code and the fundamental purpose of section 365.

The unique characteristics of trademarks support a holding that licensees cannot continue to use

trademarks after a debtor rejects a trademark license under section 365 because continued use necessarily imposes costs and burdens on the debtor licensor.

3. The Present Case is Not an Appropriate Vehicle for the Court to Establish New Standards.

Even assuming a split of authority that warrants the attention of this Court, the present case is not the proper vehicle for the Court to use to resolve such a split. This case is a particularly poor choice for the Supreme Court to (prematurely) forestall either the bankruptcy court evolution of the law or appropriate legislative action to try to create new standards here, because key points regarding the burdens on the debtor of the continued policing of the trademark, the debtor's balancing of those costs versus any benefits derived from that effort, the impact of a "stranding" of the trademark were the mark to become "abandoned," was not litigated on a developed evidentiary record below. If the Court were to take up this abstract question on such a thin evidentiary record, that would likely lead either to new standards based largely on speculation, or a further remand for fleshing out the evidence. Far better to await further developments in courts as Congress expressly stated it intended or to allow Congress to revisit the issue as it also contemplated.

While the legal rulings of the Seventh and First Circuits appear irreconcilable, it is important to note that the facts of *Sunbeam* and the present matter are

significantly different. *Sunbeam* involved a short term transitional license for sale of a finished product. The quality control issues in that case were minimal because the term of the license was so short. The present matter, on the other hand, involved a two-year license that the courts below found was part of a complex joint venture/joint marketing and distribution arrangement. The complexity of agreement between the parties would have required post-rejection interaction between Old Cold and the Petitioner to ensure maintenance of quality control and was a major factor in the First Circuit's decision to diverge from *Sunbeam*.

Further complicating the Court's resolution of the nascent circuit split, this case involves a license that has already expired by its own terms. On or about June 30, 2014 Mission Products purported to exercise its right to terminate the agreement without cause, which triggered a two-year wind down period. On July 22, 2014, citing certain breaches of the agreement by Mission Products, Old Cold issued its own notice of termination to Mission Products. The parties, pursuant to the agreement, then commenced a two-part arbitration process to resolve their cross claims of breach of contract against one another.

At the end of the first phase of the arbitration process, the arbitrator issued a ruling that, among other things, held that the agreement would terminate at the end of the wind-down period, or by June 30, 2016. Therefore, the agreement terminated by its own terms more than two years ago independent of Old Cold's rejection of the agreement in its bankruptcy case.

If the Court grants certiorari and thereafter rules for Petitioner, the resulting rule in another case, for example, involving franchised trademarks or a situation where a court is confronted with multiple non-exclusive licensees, will likely lead to unintended consequences. These consequences may include widespread consumer confusion regarding the licensed brands and potential *de facto* abandonment of trademarks due to the loss of unitary ownership.

Further, Mission Products did not exploit the subject trademarks in the two-year period leading up to the termination of the agreement, nor had it indicated that it had any intention or desire to do so. Mission Products neither ordered nor sold any of the subject goods under the agreement for more than two years leading up to the termination of the agreement in June 2016. In a letter dated April 16, 2015 that is part of the record below, Mission Products advised Old Cold that it would not order any products from Old Cold during 2015 and 2016. The statement was made manifest by Mission Products' conduct thereafter. In 2014, Old Cold received approximately $5 million in revenues from Appellant. In the calendar years 2015 and 2016, those revenues were $0.00 through the date of termination. Accordingly, Mission Products' claims arising from alleged breaches of the agreement, present unique and complex issues because it is not certain how Mission Products could prove any damages. That critical fact is distinct from *Sunbeam* in which the non-debtor licensee was actively exploiting the subject trademark in the marketplace.

Moreover, the record is devoid of any evidence of the costs and burdens that post-rejection maintenance of the trademark would have imposed on Old Cold during the two-year wind down period. Additionally, the underlying agreement is at best opaque in spelling out the intellectual property rights of the parties and, to some extent, the dispute that is now before the Court is predicated on the uncertainty of rights set forth in the agreement. In short, this is not a case that should be the platform for announcing new standards for the rights of a trademark licensee post-rejection.

4. Section 365(n) Does Not Provide a Mechanism to Protect Non-Intellectual Property Distribution Rights.

Petitioner also urges the Court to expand the scope of section 365(n) to include its exclusive distribution rights under contract. As the First Circuit correctly held, Petitioner's position requires a tortured reading of section 365(n)(1) that comports with neither the clear language of the section nor the legislative intent in protecting a narrowly defined subset of rights for non-debtor licensees post-rejection.

There is no need for the Court to consider Petitioner's expanded, and unsupported reading of section 365(n) with respect to its mere distribution rights. The First Circuit correctly found that Petitioner's exclusive right to distribute certain products in a limited geographic territory did not rise to the level of a grant of

a license in intellectual property that would enjoy post-rejection protection under section 365(n).

While Petitioner urged the First Circuit to read the parenthetical in section 365(n) "any exclusivity provision of such contract" to mean any "exclusivity provision" in the entire agreement and not simply a provision that grants exclusive use of a pertinent intellectual property right, the First Circuit did not embrace such an expansive reading. Despite making this argument in four different forums, the Petitioner is unable to provide any support for such an expansive reading. Nor do the *amici* in their briefs. Somewhat ironically, this issue was the only one on which the BAP ruled against the Petitioner. It remains unclear why Petitioner continued to pursue further appellate relief after receiving a favorable ruling from the BAP on the central section 365(n) issue.

Here, the First Circuit focused on the intention of section 365(a) and the rights retained by a licensee of intellectual property and found that the parenthetical is intended to make clear that those rights "to such intellectual property" include any exclusivity attributes of those rights, nothing more.

CONCLUSION

For all of the foregoing reasons, the Court should deny the petition for a writ of certiorari.

Dated: September 7, 2018

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No. 17-1657

IN THE

Supreme Court of the United States

MISSION PRODUCT HOLDINGS, INC.,
Petitioner,

v.

TEMPNOLOGY, LLC, N/K/A OLD COLD LLC,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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STATUTORY PROVISIONS

11 U.S.C. §365 ..... *passim*

INTRODUCTION

Tempnology admits that there is a square circuit split on the question whether, under §365(g) of the Bankruptcy Code, a debtor's rejection of a trademark license agreement strips the licensee of the right to use the trademark. It does not dispute the importance of the question, to which the amicus briefs in support of certiorari attest. Nor does it dispute that, given the First Circuit's decision to adopt the discredited reasoning of the Fourth Circuit in *Lubrizol* and to reject the Seventh Circuit's contrary approach, the courts of appeals will not resolve this split on their own.

Instead, Tempnology advances the startling contention that the split should not be resolved by the courts at all. Based on the legislative history of §365(n), Tempnology argues that the Congress of 1988 intended bankruptcy courts to address this question of statutory interpretation on a case-by-case, "equitable" basis, to inform potential future legislation. It claims this Court should not "forestall ... legislative action" by "reach[ing] a uniform judicial resolution" of the issue. Opp. 3, 8-9. But it has been thirty years since Congress repudiated *Lubrizol*'s understanding of rejection by adopting §365(n). The courts are nonetheless at an impasse on the question whether *Lubrizol*'s reasoning applies to trademarks and other rights not enumerated in §365(n). And there is no congressional fix on the horizon. Only the Court's intervention will restore uniformity on this important issue of bankruptcy law.

Tempnology also argues that this case is not the appropriate vehicle for deciding the issue. Those arguments fail. Tempnology claims that the question presented cannot be decided without an extensive factual record regarding the burdens purportedly placed

on the debtor by policing the licensee's use of the trademark. But the question presented is a pure question of law: Is rejection of a license agreement simply a "breach," as §365(g) provides, that enables a debtor to repudiate its own affirmative performance obligations under the agreement? Or does rejection give the debtor a special power to eliminate the licensee's rights under the agreement even if, outside bankruptcy, the debtor's breach could not affect those rights? The answer to that question does not turn on how "burdensome" it might be for a debtor to monitor the trademark. Accordingly, no factual record on that issue is necessary or even relevant.

Reviving an argument the First Circuit rejected, Tempnology also wrongly suggests that this case is moot. It says that the license agreement here has expired, and that Mission never sought to use the trademark in the two years before expiration. The first point is irrelevant, and the second is false. The agreement was rejected nine months *before* it expired. And Mission did seek to use the trademarks during the wind-down period; it has sought damages stemming from Tempnology's refusal to allow Mission to exercise its rights under the license agreement during that period. The amount of damages Mission recovers will depend on the answer to the questions presented here. There is thus no doubt that this is a live dispute.

Finally, Tempnology makes no effort to defend the First Circuit's related holding that an exclusive right to sell a patented product in a given territory is not a "right to intellectual property" under §365(n). The right to sell a patented invention is perhaps the most important right attaching to a patent. Pet. 30-35. Holding that such a right is not "intellectual property" defies the statute's plain text and common sense.

Together, the First Circuit's two holdings give debtors enormous and unwarranted power to strip licensees of their rights, thwarting Congress's design and undermining the intellectual-property licensing regime that Congress deemed key to technological and economic development. This Court should grant review.

I. The Court Should Grant Review Of The Question Whether Rejection Terminates A Licensee's Rights

A. Tempnology Admits The Clear Circuit Split

Tempnology admits that there is a square circuit split regarding the effect of rejection on licensees' rights. The best it can do is to quibble with the depth of the split and argue that review is "premature." Opp. 2-3, 5-9. But Tempnology offers no good reason to wait.

1. Tempnology argues that the disagreement is a 1-1 split between the First and Seventh Circuits, rather than a 2-1 split between the First and Fourth Circuits on the one hand and the Seventh Circuit on the other. Opp. 4-6. That is incorrect. Contrary to Tempnology's claim, the Fourth Circuit's reasoning in *Lubrizol* applied not just to patent licenses, but to all intellectual property licenses and indeed to all executory contracts. *Lubrizol* was a case about the consequences of rejection under §365(g), and it held that "by rejecting [an] agreement, [a] debtor could ... deprive [the licensee] of all rights" conveyed under the agreement. *Lubrizol Enters, Inc.* v. *Richmond Metal Finishers, Inc.*, 756 F.2d 1043, 1048 (4th Cir. 1985).

The Seventh Circuit accordingly framed the question in *Sunbeam* as "whether *Lubrizol* correctly understood §365(g)." *Sunbeam Prods., Inc.* v. *Chicago Am. Mfg., LLC*, 686 F.3d 372, 376 (7th Cir. 2012). Finding

"*Lubrizol* mistaken," the Seventh Circuit held that "[w]hat §365(g) does by classifying rejection as breach is establish that in bankruptcy, as outside of it, the other party's rights remain in place." *Id.* at 376-377. It expressly stated that its decision "create[d] a conflict among the circuits." *Id.* at 378. The First Circuit likewise acknowledged that "other circuits are split" on the question and expressly rejected *Sunbeam*'s interpretation of §365(g) in favor of *Lubrizol*'s "contrary approach." App. 2a, 22a-27a.[1]

More fundamentally, it makes no meaningful difference whether the split is 1-1 or 2-1. Tempnology does not dispute that the split exists and that the First Circuit's adoption of *Lubrizol*'s widely criticized approach, despite the Seventh Circuit's rejection of *Lubrizol*, makes clear that the split will not heal itself.

2. Nor should this Court wait for "bankruptcy courts to develop law ... to inform ... further Congressional action" (Opp. 8). Congress enacted §365(n)—repudiating *Lubrizol*—in 1988. Courts have thus had three decades to "develop law" on this question, and the result is an entrenched split among both the courts of appeals and the bankruptcy courts. And while Congress could potentially address the issue "through legislative action" (Opp. 9), that is true of any statutory interpretation case, and certainly not a reason to deny certiorari. It is both appropriate and necessary for this Court to step in to resolve the admitted split of

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[1] Bankruptcy courts are likewise divided. Pet. 18. Contrary to Tempnology's claim (at 6), those decisions do not turn on factual distinctions but on the legal question whether *Lubrizol* correctly interpreted §365(g). Pet. 18 (citing cases adopting and rejecting *Lubrizol*).

authority over the interpretation of a central provision of the Bankruptcy Code.

B. The First Circuit's Decision Is Wrong

Tempnology's efforts to defend the merits of the First Circuit's decision fail.

1. Tempnology spends considerable space arguing that trademarks are not covered by §365(n). Opp. 7-9. Mission agrees. Pet. 2-3, 10, 17-18, 27. Tempnology's lengthy argument on this undisputed point merely confuses the issue.[2]

2. When Tempnology does address the actual question presented, it never grapples with the text of §365(g), which states that rejection is a "breach," or with *Sunbeam*'s interpretation of that text. Instead, it simply asserts that the First Circuit's decision furthers the purpose of rejection: to "'release the debtor's estate from burdensome obligations that can impede a successful reorganization.'" Opp. 10 (quoting *NLRB* v. *Bildisco & Bildisco*, 465 U.S. 513, 528 (1984)). What Tempnology and the First Circuit miss is that rejection permits the debtor to repudiate burdensome obligations *to perform under contracts*, at the price of paying damages to the counterparty. It does not permit the debtor to repudiate any and all obligations that might impede its reorganization. "No legislation pursues its purposes at all costs," *American Express Co.* v. *Italian Colors Rest.*, 570 U.S. 228, 234 (2013), and the Bankruptcy Code is no exception; it does not give debtors

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[2] Tempnology's rewrite of the first question presented to ask whether trademarks are "protect[ed] ... under section 365(n)" (Opp. i) is similarly misleading. The first question presented does not concern §365(n), but whether, under §365(g), rejection terminates a licensee's rights. Pet. i.

the power to do anything that makes reorganizing easier.

Rather, under §365(g), rejection "constitutes a breach" of the rejected contract. Like a breach outside bankruptcy, rejection enables the debtor to repudiate its obligation to perform under a contract it deems unprofitable. The debtor benefits because the counterparty's damages are treated as a pre-petition claim, paid only whatever percentage other general unsecured creditors receive. But, also like a breach outside bankruptcy, rejection does not take away rights already conveyed to the counterparty. "§365(g) ... establish[es] that in bankruptcy, as outside of it, the other party's rights [to use licensed intellectual property] remain in place" after rejection. *Sunbeam*, 686 F.3d at 377; *see* Pet. 22-25; Law Professors' Br. 2-17; International Trademark Ass'n (INTA) Br. 14-20.

The First Circuit concluded, and Tempnology argues, that this rule cannot apply to trademarks. Permitting a licensee to use a trademark after rejection, they claim, unduly burdens debtor-licensors, who may need to monitor the use of their trademarks if they want to retain ownership of them. App. 22a-24a; Opp. 10-14. But this is not the kind of "burden" rejection enables a debtor to shed. Any need Tempnology might have had to monitor its trademarks arose not from its agreement with Mission, but from trademark law applicable to all trademark owners. Pet. 28; INTA Br. 18-19. And, as noted, rejection relieves debtors only of obligations to perform under a contract; it cannot, by definition, absolve a debtor from generally applicable, non-contractual obligations. Nor does rejection empower a debtor to strip a licensee of a previously granted license to spare the debtor the "burden" of such non-contractual obligations.

Tempnology's argument is flawed for an additional reason. Recognizing that a licensee's rights survive rejection does not compel the licensor to monitor its trademark. Licensors monitor trademarks for their own benefit, and whether to do so is a choice. If the licensor chooses not to monitor, it could potentially forfeit its ownership of the mark. INTA Br. 18-19; *see, e.g.*, *Eva's Bridal Ltd.* v. *Halanick Enters., Inc.*, 639 F.3d 788, 789-791 (7th Cir. 2011).[3] But that does not make trademark monitoring an obligation that can be rejected in bankruptcy. The choice whether to monitor a trademark is no different than other choices debtors make every day regarding property of the bankruptcy estate: either to incur the necessary costs to preserve the property's value or, if those costs outweigh the benefits, to abandon the property. Rejection cannot relieve the debtor of such choices.[4]

3. Finally, the parade of horribles Tempnology claims will ensue if this Court reverses the First Circuit (Opp. 13) is imaginary. Recognizing that §365 does not empower debtors to undo deals made before bankruptcy would not enable counterparties to demand specific performance of a debtor's unperformed contractual obligations. It would not require any performance from debtors at all. It would simply ensure that licensees

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[3] As INTA notes (at 19-20), however, the standards for monitoring licensed trademarks have become increasingly lenient, and agreements typically require licensees to maintain quality-control standards—something a licensee would still have to do after rejection.

[4] Tempnology claims (at 10-12) that trademarks are distinct from other forms of intellectual property, but fails to explain how those distinctions could make a difference to the meaning of rejection under §365(g).

retain the right to use intellectual property after rejection of a license agreement, as they would after breach of such an agreement outside bankruptcy. Nor would recognizing §365's limitations mean that licensees could use the licensed property without paying royalties. Outside bankruptcy, if a licensee wants to continue using licensed intellectual property after a licensor's breach, the licensee must still comply with the terms of the license, including any requirement to pay royalties. *See, e.g.*, *S&R Corp.* v. *Jiffy Lube Int'l, Inc.*, 968 F.2d 371, 376-378 (3d Cir. 1992); *Boscorale Operating, LLC* v. *Nautica Apparel, Inc.*, 749 N.Y.S.2d 233, 234-235 (App. Div. 2002); INTA Br. 9. The same principle applies in bankruptcy.

C. This Case Is An Excellent Vehicle For Resolving The Question

As a last resort, Tempnology attempts to manufacture vehicle problems. Those supposed problems are illusory.

1. Tempnology contends that the Court should deny review because of the "thin evidentiary record" on points like the burden on the debtor of continued policing of trademarks. Opp. 14. But that "burden" is irrelevant to the pure question of law here: whether, under §365(g), rejection of a license agreement terminates the licensee's rights that would survive breach outside bankruptcy. This question of statutory construction does not—and cannot, as a matter of logic—turn on the nature or extent of the "burden" a debtor might have to bear if the licensee's rights do survive rejection.

2. Tempnology also suggests that this case is "an academic exercise that cannot concretely affect these parties." Opp. 1, 15-16. That is untrue—as the First

Circuit concluded after the parties briefed mootness. C.A. Order (Aug. 30, 2017).

Tempnology states that the license agreement is now terminated, but that does not moot this case. The agreement terminated nine months *after* Tempnology rejected it. App. 4a-5a, 83a-84a. The parties consequently have a live disagreement over the scope of Mission's rights, and Mission's damages for the violation of those rights, during that post-rejection, pre-termination period. If this Court grants certiorari, its decision will determine how Mission's claim for over $4 million in damages will be treated. Indeed, Tempnology agreed to stay proceedings on Mission's damages claim pending this Court's resolution of the petition, acknowledging that the outcome here affects Mission's claim. C.A. Mission Resp. (Sept. 8, 2017), Ex. B (claim); Stipulated Order, Bankr. Dkt. 519.

Tempnology also contends (at 1, 16) that Mission never sought to exploit the licensed trademarks during the two years before the agreement terminated. That is incorrect. As the arbitrator found, Mission placed orders and sought to use the trademarks during that period, but Tempnology thwarted Mission by wrongfully repudiating the agreement and demanding that Mission cease using its trademarks. Partial Final Award 11-13, Bankr. Dkt. 99-2. In short, there is no obstacle to this Court's granting review.

II. The Court Should Grant Review Of The Question Whether An Exclusive Right To Sell Patented Products Is A "Right To Intellectual Property" Under §365(n)

Tempnology does not defend the First Circuit's holding that an exclusive right to sell patented prod-

ucts within a particular field of use and territory is not a "right to intellectual property" under §365(n). Instead, it inexplicably addresses an entirely different question, arguing that §365(n)'s protection for exclusivity provisions extends only to provisions granting exclusive rights to intellectual property. Opp. 18. But the petition never argued otherwise. Rather, it demonstrated that the exclusive right to distribute a patented product *is* a right to intellectual property—specifically, a right to sell a patented invention—under the statute's plain language, and that the First Circuit seriously erred in holding otherwise. Pet. 31-35. Tempnology has nothing to say in response.

The First Circuit is the first court of appeals, to Mission's knowledge, to address this issue. That is undoubtedly because, before this case, no one had ever questioned whether an exclusive right to sell products practicing a patent—even if limited to a particular field of use and territory—is a right to intellectual property. Plainly, it is: It is a stick in the bundle of rights that make up patent ownership, and such sticks are often licensed individually. Pet. 31-35. Lower courts have found it obvious that such an exclusive right to sell a patented product is "precisely the kind of exclusive intellectual property right[] that [is] protected" by §365(n). *In re SIMA Int'l, Inc.*, 2018 WL 2293705, at *10 (Bankr. D. Conn. May 17, 2018); *see* Pet. 33 (citing cases).

On its own, the First Circuit's misapprehension of what constitutes a "right to intellectual property" would be a candidate for summary reversal. *See, e.g.*, *Nitro-Lift Techs., LLC* v. *Howard*, 568 U.S. 17, 18 (2012) (per curiam) (summarily vacating decision for "ignor[ing] a basic tenet of the [Federal Arbitration] Act[]"); *Marmet Health Care Ctr., Inc.* v. *Brown*, 565

U.S. 530, 532 (2012) (per curiam) (summarily vacating decision for "incorrect" interpretation of Federal Arbitration Act). But since it accompanied the First Circuit's equally misguided understanding of "rejection," as to which there is a square circuit split, this Court should grant both questions and set the case for full briefing and argument. Considering the two questions together will enable the Court to clarify the scope of intellectual property licensees' rights both under §365(g)'s definition of "rejection" and under the safe harbor of §365(n).

***

The First Circuit's decision has far-reaching ramifications. Its adoption of *Lubrizol*'s discredited reasoning threatens not only trademark licensees—which would be enough—but any party to a contract whose rights would survive the other party's breach outside bankruptcy. Reading §365 to grant debtors a broad power to undo deals made before bankruptcy, without satisfying the specific criteria for avoiding transfers of property set out elsewhere in the Code, contravenes the statute's text and the consensus of courts and scholars. It also threatens licensees' ability to rely on their license agreements and thus jeopardizes the stability of the intellectual property licensing scheme as a whole. INTA Br. 21-27. And the First Circuit's failure to recognize that a right to sell a patented product is an intellectual property right exacerbates that threat by depriving a large group of licensees of §365(n)'s intended protections. The Court should grant certiorari and restore uniformity and certainty on both of the exceptionally important questions presented.

CONCLUSION

The petition should be granted.

Respectfully submitted.

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No. 17-1657

IN THE

Supreme Court of the United States

MISSION PRODUCT HOLDINGS, INC.,

Petitioner,

—v.—

TEMPNOLOGY, LLC, N/K/A OLD COLD LLC,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

AMICUS CURIAE BRIEF OF THE INTERNATIONAL TRADEMARK ASSOCIATION IN SUPPORT OF PETITIONER

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AMICUS CURIAE BRIEF OF THE INTERNATIONAL TRADEMARK ASSOCIATION IN SUPPORT OF PETITIONER

The undersigned *amicus curiae* respectfully submits this brief in support of the petition for certiorari filed by petitioner Mission Product Holdings, Inc., seeking review of the decision of the United States Court of Appeals for the First Circuit.[1]

INTEREST OF THE *AMICUS CURIAE*

Founded in 1878, *amicus curiae* The International Trademark Association (INTA) is a not-for-profit organization dedicated to the support and advancement of trademarks and related intellectual-property concepts as essential elements of trade and commerce. INTA has more than 7,200 members in 191 countries. Its members include trademark owners as well as law firms and other professionals who regularly assist brand owners in the creation, registration, protection, and enforcement of their trademarks. All INTA members share the goal of promoting an understanding of the essential role that trademarks play in fostering

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[1] Both Petitioner and Respondent have provided their written consent to INTA's filing of a brief. This brief was authored solely by INTA and its counsel. No party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, and its counsel made such a monetary contribution to its preparation or submission. *See* S. Ct. R. 37.6.

effective commerce, fair competition, and informed decision-making by consumers.

INTA (formerly known as the United States Trademark Association) was founded in part to encourage the enactment of federal trademark legislation after the invalidation on constitutional grounds of the United States' first trademark act. Since then, INTA has been instrumental in making recommendations and providing assistance to legislators in connection with almost all major trademark legislation, and has participated as *amicus curiae* in numerous cases involving significant trademark issues.[2] INTA members are

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[2] Cases in which INTA has filed *amicus* briefs include: *Matal v. Tam*, 137 S. Ct. 1744 (2017); *Hana Fin., Inc. v. Hana Bank*, 135 S. Ct. 907 (2015); *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293 (2015); *Pom Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228 (2014); *Already, LLC v. Nike, Inc.*, 568 U.S. 85 (2013); *KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111 (2004); *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003); *Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418 (2003); *TrafFix Devices, Inc. v. Mktg. Displays, Inc.*, 532 U.S. 23 (2001); *Wal-Mart Stores, Inc. v. Samara Bros.*, 529 U.S. 205 (2000); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999); *Dickinson v. Zurko*, 527 U.S. 150 (1999); *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159 (1995); *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763 (1992); *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281 (1988); *Shammas v. Focarino*, 784 F.3d 219 (4th Cir. 2015); *Ferring B.V. Inc. v. Watson Laboratories, Inc.-Fla.*, 764 F.3d 1382 (3d Cir. 2014); *Christian Louboutin S.A. v. Yves Saint Laurent Am. Holdings, Inc.*, 696 F.3d 206 (2d Cir. 2012); *Rosetta Stone Ltd. v. Google, Inc.*, 676 F.3d 144 (4th Cir. 2012); *Fleischer Studios, Inc. v. A.V.E.L.A.*,

frequent participants in licensing arrangements, are often parties in trademark-related litigation as both plaintiffs and defendants, and are also often parties in bankruptcy proceedings as both debtors and creditors.

INTA and its members have a particular interest in this case because the question presented – whether a debtor-licensor can terminate a trademark license by rejection, thereby "taking back" trademark rights it has licensed and precluding its licensee from using the trademark – is the most significant unresolved legal issue in trademark licensing. That issue has led to uncertainty in the market for trademark licenses. There is a growing circuit split on this issue, which the First Circuit's decision exacerbates.

Uncertainty regarding the status of trademark licenses involving a bankrupt licensor affects the broader business community, given that trademarks are the most widely used form of registered intellectual property. World Intellectual Property Organization, WORLD INTELLECTUAL PROPERTY

Inc., 654 F.3d 958 (9th Cir. 2011); *Levi Strauss & Co. v. Abercrombie & Fitch Trading Co.*, 633 F.3d 1158 (9th Cir. 2011); *Chloe v. Queen Bee of Beverly Hills, LLC*, 616 F.3d 158 (2d Cir. 2010); *Starbucks Corp. v. Wolfe's Borough Coffee, Inc.*, 588 F.3d 97 (2d Cir. 2009); *ITC. Ltd v. Punchgini, Inc.*, 482 F.3d 135 (2d Cir. 2007); *Louis Vuitton Malletier, S.A. v. Haute Diggity Dog, LLC*, 507 F.3d 252 (4th Cir. 2007); *Test Masters Educ. Servs. v. Singh*, 428 F.3d 559 (5th Cir. 2005).

REPORT: BRANDS – REPUTATION AND IMAGE IN THE GLOBAL MARKETPLACE 9 (2013). In light of the importance of trademarks to businesses and the economy, it hardly is surprising that trademark rights, in many instances, are among a debtor's key assets and that trademark issues frequently arise in the bankruptcy context.

The circuit split on the issue presented by the petition has affected the value of trademark license agreements, to the detriment of licensors, licensees, and the consumers they both serve. INTA members are interested in the development of clear, consistent, and equitable principles for bankruptcy proceedings that preserve and enhance the value of trademarks for all parties. Clear, consistent, and equitable rules not only will facilitate restructuring for debtors in bankruptcy, but they also will enhance the value of trademark licenses in the pre-bankruptcy context. These benefits, in turn, will help trademarks better perform their core function of helping guide consumers to the products and services they want, with reliable assurances of source and quality.

SUMMARY OF ARGUMENT

This Court should grant the petition for certiorari in order to resolve the substantial circuit split concerning whether debtor-licensors can terminate a trademark license by rejection, and to promote the strength and stability of the trademark system by adopting the rule articulated in *Sunbeam Prods, Inc. v. Chicago Mfg., LLC*, 686 F.3d 372 (7th Cir. 2012).

In the decision below, the First Circuit held that a debtor, who has the right to "reject" executory contracts in order to eliminate contractual obligations that may interfere with a restructuring, may reject a trademark license agreement, and that the effect of that rejection is to permanently terminate the licensee's right to use the licensed trademark. Other courts have taken a different approach: They have held that the rejection of a trademark license agreement eliminates the debtor-licensor's requirement that it perform its obligations under the agreement (for example, the licensor need no longer undertake or fund enforcement efforts against infringers of the licensed mark, or defend third-party infringement claims brought against the licensee), but it does not terminate the licensee's right to continue to use the trademark under license.

The First Circuit plainly acknowledged the existence of a circuit split on this issue. The ongoing uncertainty harms trademark licensors, licensees, bankruptcy creditors, and consumers alike.

The Court should adopt the *Sunbeam* approach because it enhances the value of trademark licenses and promotes the stability of the trademark system:

- Licensors benefit because licensees will pay more up front or in royalties for licensed rights that survive a potential bankruptcy filing by the licensor.

- Licensees, who have substantial reliance interests in the licensed trademarks (*e.g.*, having hired employees and/or established manufacturing capacity to take advantage of the rights), will not suddenly find their rights rendered valueless by the licensor's decision to terminate a trademark license agreement through rejection in bankruptcy.

- Above all, the American public will be better off. The ultimate beneficiary of a strong trademark system is the consumer, who can rely on healthy trademarks as indicators of source and quality. William M. Landes and Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 J. LAW AND ECON. 265, 270 (1987).

Resolving this issue will have important consequences beyond the effect of rejecting a trademark license agreement. This case presents an opportunity to clarify the effect of rejection under

Section 365 of the Bankruptcy Code as a general matter. The *Sunbeam* approach is consistent with the broader equitable purposes of the Code, under which rejection of a contract generally is understood as a breach (with associated remedies) and not a termination of the agreement.

The purpose of rejection is to free the debtor from onerous contractual obligations that it otherwise would be required to perform (such as equipment lease payments or routine contracts for monthly services). Rejection never was intended to provide the debtor with a means to recover legal rights it had granted pre-petition through the artifice of unwinding trademark licenses. Adoption of the *Sunbeam* rule would enable licensors to optimize the value of licensing a trademark without stripping licensees of rights that they have acquired and as to which they may have made investments at substantial expense.

Uncertainty has percolated throughout the circuits since this Court denied certiorari in *Sunbeam*, and the circuit split has widened since then. This petition presents a rare opportunity to resolve the conflict. The nature of bankruptcy proceedings – with their emphasis on quick, negotiated resolutions – is such that pure questions of law (like the one here) often are not presented to this Court. A grant of certiorari is especially warranted where an issue that has split the circuits

arises fairly regularly in the lower courts but infrequently is raised before this Court.

For all these reasons, INTA urges the Court to grant certiorari and hear this case to adopt the holding in *Sunbeam*.

ARGUMENT

I. This Court Should Grant Certiorari to Resolve the Circuit Split by Adopting the *Sunbeam* Rule

A. The Split Below Is Substantial and Leads to Uncertainty

There can be no doubt that the lower courts are divided.

In *Lubrizol Enters., Inc. v. Richmond Metal Finishers, Inc.*, 756 F.2d 1043 (4th Cir. 1985), the Fourth Circuit held that, when a debtor-licensor rejects an executory license agreement, the rejection terminates the license. Because the license was treated as terminated, it required that the licensee discontinue all use of the licensed intellectual property, leaving the licensee with only a pre-petition damages claim for the value of the now-terminated license.

In 1987, Congress expressly abrogated *Lubrizol's* result with respect to licenses of patents, copyrights, and trade secrets, *see* 11 U.S.C. § 365(n), but expressly left open the question of the impact of

rejection on trademark licenses. With respect to trademark licenses, *Lubrizol* remains good law in the Fourth Circuit and courts in other circuits continue to rely on *Lubrizol* in holding that a licensee's rights are terminated upon rejection. *See, e.g., In re HQ Global Holdings, Inc.*, 290 B.R. 507, 512-13 (Bankr. D. Del. 2003); *In re Blackstone Potato Chip Co.*, 109 B.R. 557, 560-61 (Bankr. D.R.I. 1990); *In re Centura Software Corp.*, 281 B.R. 660, 673 (Bankr. N.D. Cal. 2002).

In *Sunbeam Prods., Inc. v. Chicago Mfg., LLC*, 686 F.3d 372 (7th Cir.), *cert denied*, 568 U.S. 1076 (2012), the Seventh Circuit reached the opposite conclusion. Judge Easterbrook's opinion for the court held that the rejection of a debtor-licensor's obligations under a trademark license agreement is a breach but not a termination. That is, the rejection relieves the licensor of any obligations under the agreement and is a breach that may cause harm to the licensee, for which the licensee might have a remedy. Under the Seventh Circuit's reasoning, however, rejection does not terminate either the licensee's right to continue using the licensed mark or its obligation to continue to comply with the license. Those obligations might include making any necessary royalty payments and maintaining quality control, which the licensor may continue to enforce.

The split extends beyond the Fourth and Seventh Circuits. Even before *Lubrizol*, the Ninth Circuit had offered reasoning in line with the Seventh Circuit,

indicating that rejection does not impair a licensee's ability to use licensed intellectual property pursuant to the contract. *In re Select-A-Seat Corp.*, 625 F.2d 290 (9th Cir. 1980) (per curiam).[3]

Similarly, in *In re Exide Techs.*, 607 F.3d 957 (3d Cir. 2010), Judge Ambro's concurring opinion advocated the *Sunbeam* approach. There, the licensee, whose license had been terminated by the debtor-licensor, had argued (1) that the license was not executory, and (2) that the court below had erred in determining that the rejection terminated the licensee's rights. The majority opinion in *Exide* did not reach the second issue[4] because it concluded that

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[3] Congress subsequently abrogated *Select-A-Seat*'s holding that rejection of a contract can void an exclusivity agreement. *See* 11 U.S.C. § 365(n)(1)(B) (stating that, upon rejection, a licensee can retain its rights "including a right to enforce any exclusivity provision"). Neither that congressional action, nor any subsequent Ninth Circuit caselaw, changes the view expressed in *Select-A-Seat* as to the effect of rejection on the licensee's ability to use licensed intellectual property after rejection.

[4] Although the court did not expressly reject *Lubrizol*'s treatment of "rejection" as termination, the decision does conflict with *Lubrizol*'s analysis of whether a trademark license is "executory." In an attempt to avoid *Lubrizol*, the majority held that the paid-up, perpetual trademark license was not executory because both the licensor and licensee had "substantially performed"; the licensor's obligation to maintain quality control was insignificant, noting that the licensor had never defined quality standards. 607 F.3d at 963-64. This may have distinguished *Lubrizol*; however, in suggesting that a

the license at issue was not executory. *Id.* at 964. In his concurrence, Judge Ambro did address the second issue: "a trademark licensor's rejection of a trademark agreement under 11 U.S.C. § 365 does not necessarily deprive the trademark licensee of its rights in the licensed mark." *Id.* at 965 (Ambro, J., concurring). He emphasized that the bankruptcy laws should not allow a licensor to take back rights that it had bargained away. *Id.* at 967.

Lower courts among the various circuits also are split. As noted above, bankruptcy courts in Delaware, Rhode Island and California have followed the *Lubrizol* approach; in contrast, bankruptcy courts in Colorado and New Jersey have followed the approach in *Sunbeam*. *See, e.g.*, *Banning Lewis Ranch Co. v. City of Colo. Springs (In re Banning Lewis Ranch Co.)*, 532 B.R. 335, 345 (Bankr. D. Co. 2015) ("rejection of a contract does not work a rescission of the contract and is not, itself, an avoiding power"; holding licensees under rejected contract could continue to use trademark rights granted under licenses) (citing *Sunbeam*, 686 F.3d at 377); *In re Crumbs Bake Shop, Inc.*, 522 B.R. 766, 770 (Bankr. D.N.J. 2014) ("This Court is not persuaded by the decision in *Lubrizol* and is not alone in finding that its reasoning has been discredited."); *see also In re Rent-A-Wreck of Am.*,

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licensor had not defined quality standards, it might suggest that the trademark license was naked.

Inc., 580 B.R. 364, 387 & n.156 (Bankr. D. Del. 2018) (noting the "unsettled area of rejection of trademark licenses," and recognizing that, regardless of which circuit court's view was adopted in the case, "further litigation" is "certain to follow" and could delay resolution of the bankruptcy case "for years.").

In the case that gives rise to the present petition, the First Circuit panel (which itself was split 2-1)[5] adopted the *Lubrizol* approach. It held that the rejection of a license agreement terminates the licensee's rights to use the licensed mark. The majority opinion expressly recognized that "other circuits are split" on the issue. *In re Tempnology, LLC*, 879 F.3d 389, 392 (1st Cir. 2018).

Since then, the split has grown even wider, with a bankruptcy court in Connecticut agreeing with *Sunbeam* and with the *Tempnology* dissent. *See In re Sima Int'l, Inc.*, Case No. 17-21761, 2018 WL 2293705, at *8 (Bankr. D. Conn. May 17, 2018). *Sima* criticized the *Tempnology* majority, holding that it "strains to resurrect *Lubrizol*, [and] is plainly contrary to Congress' explicit efforts to rebalance affected rights on intellectual property and leave

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[5] The majority reversed the First Circuit's Bankruptcy Appeal Panel, which, in a 3-0 decision, rejected *Lubrizol* and, in reversing the Bankruptcy Court, followed *Sunbeam*. In short, four judges in the First Circuit endorsed the *Sunbeam* approach and three endorsed the *Lubrizol* approach.

Section 365(g) to answer otherwise unresolved trademark issues."

This Court should grant the petition to resolve this conflict. All participants in the trademark licensing market will benefit from clear, consistent, and equitable rules concerning the rights of a debtor-licensor in bankruptcy. Moreover, neither licensors nor licensees should be subject to conflicts based solely on the court where the bankruptcy petition is filed. Forum shopping in bankruptcy proceedings (and otherwise) is considered by many, including this Court, to be undesirable. *See* Joint Press Statement of Senators Cornyn and Warren concerning Bankruptcy Venue Reform Act of 2018 (Jan. 8, 2018), *available at* https://www.cornyn.senate.gov/content/news/cornyn-warren-introduce-bill-prevent-%E2%80%98forum-shopping%E2%80%99-bankruptcy-cases ("Closing the loophole that allows corporations to 'forum shop' for districts sympathetic to their interests will strengthen the integrity of the bankruptcy system and build public confidence."); *see also Walker v. Armco Steel Corp.*, 446 U.S. 740, 745 (1980) (describing forum shopping as "undesirable").

Clarity alone will benefit all. *See generally* John E. Calfee & Richard Craswell, *Some Effects of Uncertainty on Compliance with Legal Standards*, 70 Va. L. Rev. 965 (1984) (uncertainty about legal standards leads to economic inefficiency). As set

forth below, INTA asks this Court to grant the petition for certiorari and to adopt the *Sunbeam* rule.

B. The *Sunbeam* Rule, Treating Rejection of a Debtor-Licensor's Contractual Obligations Under a Trademark License Agreement as a Breach but Not a Termination, Best Promotes the Strength and Stability of the Trademark System

The state of affairs under the current split helps no one. The Court, by granting the petition and adopting the *Sunbeam* rule, not only can resolve the ongoing uncertainty, but also can set down a rule that is consistent with bankruptcy law and promotes the overall health of the trademark system.

a) The *Sunbeam* Rule Is Consistent with the Bankruptcy Code.

The legislative history of Section 365(n) – which, as noted above, Congress enacted post-*Lubrizol* – makes clear that Congress did not intend to enable a debtor to cancel a pre-bankruptcy grant of intellectual property license rights through rejection: "[Section] 365 was [n]ever intended to be a mechanism for stripping innocent licensee[s] of rights." S. Rep. No. 100-505, at 4 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 3200, 3203. "Congress never anticipated that . . . the licensee would lose not only any future affirmative performance required of the licensor under the

license, but also any right of the licensee to continue to use the intellectual property as originally agreed in the license agreement." *Id.* at 3, *as reprinted in* 1988 U.S.C.C.A.N. 3200, 3201.

Significantly, that Section 365(n) did not include trademarks was not itself an endorsement of *Lubrizol*. Nor did it reflect a congressional intent that trademark licenses should be terminable by debtor-licensors. Rather, as the legislative history makes clear, Congress expressly intended that the courts consider and determine the effect of debtor rejection on trademark license rights:

> In particular, trademark, trade name and service mark licensing relationships depend to a large extent on control of the quality of the products or services sold by the licensee. Since these matters could not be addressed without more extensive study, it was determined to postpone congressional action in this area and to allow the development of ***equitable treatment of this situation by bankruptcy courts***.

S. Rep. No. 100-505, at 5 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 3200, 3204 (emphasis added). Moreover, "an omission is just an omission," and the "limited definition [of 'intellectual property'] in §101(35A) means that §365(n) does not affect

trademarks one way or the other." *Sunbeam*, 686 F.3d at 375.

Congress' reference to bankruptcy courts developing "equitable treatment" of the handling of pre-petition trademark licenses granted by a debtor-licensor is entirely consistent with the basic equitable principles underpinning the Bankruptcy Code. *See Young v. United States*, 535 U.S. 43, 50 (2002) (bankruptcy courts "are courts of equity and 'appl[y] the principles and rules of equity jurisprudence'" (*quoting Pepper v. Litton*, 308 U.S. 295, 304 (1939))). These equitable principles have been cited by courts that have embraced the *Sunbeam* approach. *See, e.g., In re Exide*, 607 F.3d at 967 (noting that "[r]ather than reasoning from negative inference to apply another Circuit's holding to this dispute, the Courts here should have used, I believe, their equitable powers to give [the debtor] a fresh start without stripping [the licensee] of its fairly procured trademark rights.") (Ambro, J., concurring).

The *Sunbeam* rule also is consistent with the general principle of bankruptcy law that rejection of an executory contract does not terminate the contract, but simply is a breach. The purpose of Section 365 is not "to be the functional equivalent of a rescission, rendering void the contract and requiring that the parties be put back in the positions they occupied before the contract was

formed." *Thompkins v. Lil' Joe Records, Inc.*, 476 F.3d 1294, 1306 (11th Cir. 2007); *see also id.* ("[r]ejection has absolutely no effect upon the contract's continued existence; the contract is not cancelled, repudiated, rescinded, or in any other fashion terminated." (quoting *In re Drexel Burnham Lambert Grp., Inc.*, 138 B.R. 687, 703 (Bankr. S.D.N.Y. 1992))); *Med. Malpractice Ins. v. Hirsch*, 114 F.3d 379, 386-87 (2d Cir. 1997) ("while rejection is treated as a breach, it does not completely terminate the contract"); *O'Neil v. Continental Airlines, Inc. (In re Continental Airlines)*, 981 F.2d 1450, 1459 (5th Cir. 1993) ("[t]o assert that a contract effectively does not exist as of the date of rejection is inconsistent with deeming the same contract breached"); *In re Modern Textile, Inc.*, 900 F.2d 1184, 1191 (8th Cir. 1990); *Leasing Serv. Corp. v. First Tenn. Bank Nat'l Ass'n*, 826 F.2d 434, 436–37 (6th Cir. 1987); *In re Austin Dev. Co.*, 19 F.3d 1077, 1082 (5th Cir. 1994).

Section 365 permits the debtor to free itself from burdensome contractual obligations that would impede its ability to obtain a fresh start. For example, a debtor-lessee can reject a non-residential property lease that requires it to pay above-market rents or a lease for equipment. In both cases, the creditor-lessor would lose the benefit of the payment stream (and would become a creditor with a claim for damages against the debtor), but at least the lessor would have its property back and could lease it to

another party. *See generally NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1984) ("authority to reject an executory contract is vital to the basic purpose of a Chapter 11 reorganization, because rejection can release the debtor's estate from burdensome obligations that can impede a successful reorganization"); *Orion Pictures Corp. v. Showtime Networks, Inc. (In re Orion Pictures Corp.)*, 4 F.3d 1095, 1098 (2d Cir. 1993) ("§ 365 permits the trustee or debtor-in-possession, subject to the approval of the bankruptcy court, to go through the inventory of executory contracts of the debtor and decide which ones it would be beneficial to adhere to and which ones it would be beneficial to reject").

Rejection of a trademark license agreement similarly may allow a debtor-licensor to avoid some burdensome contractual obligations in a trademark license. These might include the obligation to pursue or maintain trademark registrations in multiple jurisdictions or undertake or fund enforcement actions against third parties who are infringing the licensed mark.

Trademark licensors have continuing statutory obligations to maintain quality control over the licensee's use of the licensed trademark to preserve their rights in the trademark. That, however, is not the sort of contractual obligation that may be terminated through rejection. That is because the continuing obligation of a trademark owner to

maintain quality control is based on statute, *see* 15 U.S.C. § 1055, wholly independent of any contractual obligations, rejected or otherwise.

As a statutory obligation, the requirement that the licensor assert quality control over its licensee's use serves a broader public purpose beyond the contractual obligations that might be at issue when a debtor-licensor decides whether to reject a contract in bankruptcy. *See Gorenstein Enters., Inc. v. Quality Care-USA, Inc.*, 874 F.2d 431, 435 (7th Cir. 1989) ("The purpose of a trademark, after all, is to identify a good or service to the consumer, and identity implies consistency and a correlative duty to make sure that the good or service really is of consistent quality."); *Dawn Donut Co. v. Hart's Food Stores, Inc.*, 267 F.2d 358, 367 (2d Cir. 1959) ("Without the requirement of control, the right of a trademark owner to license his mark separately from the business in connection with which it has been used would create the danger that products bearing the same trademark might be of diverse qualities."). The *Lubrizol* rule, which would give debtor-licensors a right in bankruptcy that would abrogate this statutory requirement, would "make[] bankruptcy more a sword than a shield, putting debtor-licensors in a catbird seat they often do not deserve." *In re Exide*, 607 F.3d at 967-68 (Ambro, J., concurring).

Equitable principles support this result, particularly given that "the standards for sufficient

control have become more and more lenient in recent years." Laura Jelinek, *Equity for Brand Equity: The Case for Protecting Trademark Licensees in Licensor Bankruptcies*, 40 AIPLA Q.J. 365, 389-90 (2012). Any burden on the debtor-licensor to ensure that its licensee maintains quality controls is lessened by the licensee's contractual obligations to maintain quality control, including in the bankruptcy context. *In re Crumbs Bake Shop, Inc.*, 522 B.R. at 773.

The licensee of trademark rights should not be forced to live in fear that the licensor, having licensed these rights for consideration, may be entitled years later to take them back in a bankruptcy. Once the license is granted, the licensed rights (as distinct from title in the underlying trademarks) represent property of the licensee, not of the licensor. The licensor should not be entitled to rescind the grant and reclaim the licensed rights.

b) The *Sunbeam* Rule Promotes the Strength and Stability of the Trademark System.

The market for trademark licenses is enormous, diverse, and global. Licenses are granted in myriad circumstances, from the sale of a business (where the purchase price includes an up-front payment for the license), to distribution and manufacturing arrangements (where the licensed mark is central to the success of the licensees' business). That market will function best under the *Sunbeam* rule. The

Lubrizol approach contributes to uncertainty over trademark rights in bankruptcy, to the detriment of licensors, licensees, and consumers.

Trademark licensors in non-bankruptcy contexts have a strong interest in obtaining full value for their assets. Yet the circuit split means that it will be more difficult for a trademark licensor – especially one in financial distress and trying to stave off bankruptcy by generating cash – to obtain full value for pre-bankruptcy licenses of its trademarks.

It is basic economics that a potential licensee (or any contracting party) generally will pay less to a licensor for rights that would be impaired in the event of a later bankruptcy. In assessing the impact of *Lubrizol* on a licensor that might become bankrupt, a rational licensee will insist on paying a discounted price for a trademark license because that decision puts it at the mercy of the licensor as to whether it can continue to use the mark if the licensor is put into bankruptcy. *See* Nicholas W. Quesenberry, *Risky Business: How the Economic Impact of the Risk of Debtor Default Mandates Application of the Presumptive-Contract Interest Rate in the Case of a Cramdown Plan against a Secured Creditor with a Lien on Personal Property in Chapter 13*, 22 J. BANKR. L. & PRAC. 2 Art. 5. (2013) ("It is manifest that any disinterested buyer would be willing to pay less for a riskier, less stable income

stream and more for a more stable and reliable one.").

Licensees, too, are harmed by the current uncertainty in the law. A licensee that does not know whether its license might be subject to termination in bankruptcy will be less willing to invest capital in the sort of resources – personnel, machinery or other production capacity, advertising and promotion – that would enable it to maximize sales and fully profit from its license. If this results in failing to maximize sales, that, too, will reduce royalties to the trademark licensor, rendering the transaction less economically beneficial for both parties.

Moreover, it is the experience of INTA's members that licensors and licensees alike are forced by the uncertainty of the circuit split to engage in extensive and costly negotiations in the pre-bankruptcy context. Not knowing what legal rule will apply, they must work to craft customized contract provisions to try and mitigate the impact of a possible termination. In some cases, to minimize the risk created by *Lubrizol*, parties to a transaction may agree to establish a bankruptcy remote vehicle that would hold and license the trademarks, so that the "remote" licensor would not be swept into a bankruptcy of the operating company. This drains resources from more productive activity, and potentially results in lower pricing due to risk allocation from negotiation.

The *Sunbeam* rule best resolves these concerns and promotes stability of the trademark system as a whole. The rule relieves the licensor of any obligations under a trademark license agreement, but does not terminate the licensee's right to continue to use the licensed mark or its obligation to continue to comply with the license, including by maintaining quality control over the licensed product (which the licensor may continue to enforce), thus also benefiting the public.

Trademark licensors also would benefit from this regime where licensees, knowing their rights will be more valuable in any eventual bankruptcy proceeding, are incentivized to pay more for those rights in pre-bankruptcy negotiations.

The *Sunbeam* rule also is more equitable. As commentators have noted, licensees may be greatly dependent upon the licensed intellectual property rights and, as a result, could experience serious financial and other damage if a license is terminated upon a rejection in bankruptcy. David M. Jenkins, *Licensees, Trademarks, and Bankruptcy, Oh My!: Trademark Licensing and the Perils of Licensor Bankruptcy*, 25 J. MARSHALL L. REV. 143, 175 (1991). (When a licensor rejects a trademark license, "[a] trademark licensee risks the total abrogation of its right to use a trademark, a valuable property right . . . [and] licensees must continue to bear the economic burden of trademark owners' mismanagement and

thus needlessly risk the loss of their investments."). The debtor may be protected under *Lubrizol*, but the licensee has no such protection: It may find itself severely injured financially, perhaps so badly that it could go out of business.

In sum, *Sunbeam*'s approach is more equitable because it takes both parties' interests into account.

II. This Case Presents a Rare Opportunity to Clarify a Commercially Critical Area of the Law

This Court has repeatedly recognized the significance of trademarks and trademark licenses to the United States economy. *See, e.g., Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183 (2010) (addressing antitrust issues concerning trademark licensing by the National Football League); *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281 (1988) (addressing validity of Customs Service regulation concerning importation of foreign-made goods where United States trademark owner authorized use of the mark); *United States v. Sealy, Inc.*, 388 U.S. 350 (1967) (addressing antitrust issues concerning trademark licensing for mattresses). In that light, this case is particularly important.

In 2014, trademarks accounted for $6.1 trillion in value added to the U.S. gross domestic product. Economics and Statistics Administration & United States Patent and Trademark Office, INTELLECTUAL PROPERTY AND THE U.S. ECONOMY: 2016 UPDATE 22

(2016). In the United States alone, trademark licensors generated $7.3 billion in royalty revenue from the licensing of goods and services in 2014. Licensing Industry Merchandisers' Association, LIMA GLOBAL LICENSING INDUSTRY SURVEY 2015 REPORT 15 (2015). This translates into an estimated $133.3 billion in retail sales of licensed goods and services. *Id.* at 14.

Licensing provides a significant stream of revenue for trademark licensors, not to mention extensive commercial opportunities. Irene Calboli, *The Sunset of "Quality Control" in Modern Trademark Licensing*, 57 AM. U. L. REV. 341, 343 (2007). By allowing trademark licensors to outsource the manufacturing or distribution of a product to specialized licensees who can do so more cheaply or effectively, for example, licensing allows licensors to distribute workloads and enjoy the benefits of economies of scale. *See* David J. Franklyn, *The Apparent Manufacturer Doctrine, Trademark Licensors and the Third Restatement of Torts*, 49 CASE W. RES. L. REV. 671, 681 (1999). Licenses also enable licensors to increase brand recognition and to reach new markets.

Just as trademarks are more widely used than other forms of intellectual property (*see* pp. 3-4 *supra*), trademark licenses are central to bankruptcies involving intellectual property rights. "[S]ince 1988, out of 1100 bankruptcy filings

concerning intellectual property, over 600 involve trademarks." Kayvan Ghaffari, *The End to an Era of Neglect: The Need for Effective Protection of Trademark Licenses*, 87 S. CAL. L. REV. 1053, 1054 (2014). It thus is imperative that licensors and licensees both have the benefit of the clear and salutary *Sunbeam* rule.

This case presents a rare opportunity. This is the first time since 2012 (when the Court denied certiorari in *Sunbeam*) that the Court has had the opportunity to address this issue. The relative rarity of appeals on this issue hardly is surprising. In most instances, bankruptcy appeals must travel through an extra layer of appellate review to reach this Court. A bankruptcy order ordinarily must be appealed to the district court, and only then to the court of appeals. 28 U.S.C. §§ 158(a), (d). Given the need to preserve the assets of the bankruptcy estate, a trustee or licensee often will be unwilling to continue litigating a case through four different courts, and thus may decline to appeal or to seek certiorari, or may choose to settle rather than go through multiple rounds of appellate review.

Even where the litigants are willing to take a bankruptcy case all the way to this Court, the bankruptcy doctrine of "equitable mootness" may preclude appellate review. Under that doctrine, an appellate court may decline to review the merits of a bankruptcy appeal "when, even though effective

relief conceivably could be fashioned, implementation of that relief would be inequitable" because the debtor's plan of reorganization has been confirmed and "substantially consummated." *E.g.*, *In re Charter Commc'ns, Inc.*, 691 F.3d 476, 481-82 (2d Cir. 2012) (citation omitted). That doctrine is not applicable here because no plan of reorganization has been filed, and there plainly is monetary relief that could be granted to petitioner.[6]

Despite the fact that the issue presented by the petition is not likely to come again soon before this Court, it frequently is liti[illegible]ted below and is of day-to-day concern to trademark owners and practitioners as it affects essentially every trademark license. As long as there is continued uncertainty, that will continue to harm licensors, licensees, and the consuming public. INTA urges this Court to take advantage of the opportunity before it to resolve the split and to adopt the approach taken in *Sunbeam*.

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[6] The equitable mootness doctrine has been criticized because it "can easily be used as a weapon to prevent any appellate review of bankruptcy court orders confirming reorganization plans." *Nordhoff Invs., Inc. v. Zenith Elecs. Corp.*, 258 F.3d 180, 192 (3d Cir. 2001) (Alito, J., concurring).

CONCLUSION

The Court should grant the petition for a writ of certiorari.

July 11, 2018

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No. 17-1657

IN THE

Supreme Court of the United States

MISSION PRODUCT HOLDINGS, INC.,

Petitioner,

v.

TEMPNOLOGY, LLC, N/K/A OLD COLD LLC,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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INTEREST OF *AMICI CURIAE*[1]

Amici, whose names and affiliations are set forth in alphabetical order in the attached Appendix, are law professors who study the United States bankruptcy system. They write solely to share their disinterested views regarding the need for this Court's review in this case, and their concern about the effect the opinion below will have on bankruptcy law. To the best of their knowledge, no amicus has any financial interest in the outcome of this case.

SUMMARY OF ARGUMENT

The First Circuit's decision below inexplicably resuscitates a long-rejected decision—*Lubrizol Enters., Inc. v. Richmond Metal Finishers, Inc.*, 756 F.2d 1043 (4th Cir. 1985)—that allowed intellectual property licensors to exploit a bankruptcy filing to unilaterally revoke the rights of their licensees. *Lubrizol* was wrong when the Fourth Circuit decided it: The decision relied on a misreading of the statute; it has been overruled on its facts by Congress; and it has been universally rejected by bankruptcy scholars, and, until the decision below, the one other court of appeals to address the issue. *See Sunbeam Prods., Inc. v. Chi. Am. Mfg., LLC*, 686 F.3d 372, 377 (7th Cir. 2012) (Easterbrook, J.). The First Circuit's reliance below on

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[1] Pursuant to Supreme Court Rule 37, counsel of record for petitioner and respondent received timely notice of the intent to file this brief and consent to its filing. No counsel for a party authored this brief in whole or in part. No person other than amici and their counsel, and no party or counsel for a party, made a monetary contribution intended to fund the preparation or submission of this brief.

that long-rejected decision, thus, creates a split in authority between the First and Fourth Circuits, on the one hand, and the Seventh Circuit, on the other. This *amicus* brief urges this Court to resolve that split in favor of the Seventh Circuit's decision in *Sunbeam*.

The First Circuit's decision allows a debtor/licensor to unilaterally rescind a trademark license by "rejecting" the agreement under Section 365(a) of the Bankruptcy Code. *See* 11 U.S.C. §365. This holding fundamentally misunderstands the effect of "rejection" and, if left uncorrected, will allow debtor/licensors to unwind a variety of settled transfers of property rights. Under the First Circuit's rule, a debtor/licensor can use the power to reject to destroy a licensee's business or hold the licensee hostage, forcing it to pay twice for a license it had already purchased. This unjust result is the unfortunate and natural consequence of treating the power to "reject" a contract as the power to "avoid," or claw back, a transfer of property.

To the contrary, the power to "reject" a contract under Section 365 serves a crucial but more modest purpose: It allows the trustee to decline to perform a contract, where to do so would be burdensome on the estate and harmful to other creditors. Insolvent debtors in bankruptcy are, by definition, unable to satisfy all of their contractual obligations. Where the debtor is a party to a contract under which the debtor's unperformed contractual obligations are intertwined with conditional obligations of the non-debtor, the allocation of those rights and obligations is handled by Section 365. Section 365(a) gives the debtor the choice to breach ("reject") or perform ("assume"). If the debtor elects to reject, then Section 365(g) states, "the

rejection of an executory contract ... of the debtor constitutes a breach of such contract." That formal act of breach allows the non-debtor to make a pre-petition claim for damages that can be discharged through the ordinary claims allowance process. Section 365 does nothing more than that.

This brief seeks to call the Court's attention to a longstanding scholarly consensus that Section 365(g) means precisely what it says—the trustee's power to reject is simply a power to breach, not a power to avoid settled property rights. *See, e.g.*, Jay Lawrence Westbrook, *A Functional Analysis of Executory Contracts*, 74 Minn. L. Rev. 227, 247-55 (1989) (Westbrook); Michael T. Andrew, *Executory Contracts in Bankruptcy: Understanding "Rejection,"* 59 U. Colo. L. Rev. 845, 855 (1988) (Andrew).[2] This is the view adopted, correctly, by the Seventh Circuit in *Sunbeam*. The precise consequences of the pre-petition "breach" are not determined by bankruptcy law. They are based, instead, on the parties' applicable non-bankruptcy rights under their agreement and principles of contract and intellectual property law. As *Sunbeam* noted, however, *see* 636 F.3d at 376, outside bankruptcy there is no readily apparent legal principle under which a *licensor's* breach of contract would limit a

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[2] These articles are over twenty years old, but their influence continues to the present day, and their underlying insights about the meaning of 11 U.S.C. §365 remain valid. *See* note 9, *infra*. There are debates about Section 365 that continue to this day. *See* John A.E. Pottow, *A New Approach to Executory Contracts*, 96 Tex. L. Rev. 1437 (2018); Jay Lawrence Westbrook & Kelsi Stayart White, *The Demystification of Contracts in Bankruptcy*, 91 Am. Bankr. L.J. 481, 532-33 (2017) (Westbrook & White). But the question of whether Section 365(g) means what it says is not one of them. That is not in doubt.

licensee's ability to exercise rights already granted to it under that contract.

The point is not complicated or technical. If a seller of goods delivers the goods but breaches an ongoing service contract, the failure to perform would not "unsell" the goods, or give rise to a right to take them back. Section 365(g) specifies that, because rejection is merely a breach, bankruptcy does not change this result. The same principle applies to trademark licenses. A trademark license grants the licensee the right to use the trademark under certain conditions, and a defense against an infringement lawsuit brought by anyone (including non-parties) for any covered use. A debtor/licensor may have other ongoing obligations (akin to the ongoing service contract above), but if the licensor fails to perform its obligations under the license ("breaches") or rejects the license in bankruptcy, the license will nonetheless continue to operate as a defense for the non-breaching licensee against any claim of infringement.

Notwithstanding the Seventh Circuit's adherence to this principle in *Sunbeam*, the First Circuit created a clear split among the courts of appeals. By resuscitating the incorrect reasoning of *Lubrizol*, the First Circuit joined the Fourth Circuit to effectively create (or recreate) a novel, bankruptcy specific form of "statutory breach" that terminates the trademark license—immediately transforming an innocent licensee into an infringer. *See* Pet. App. 10a. This creates an extremely harsh, bankruptcy-specific rule without a clearly stated bankruptcy policy reason to do so. Under that rule, a franchisee that relies on its trademark license to do business might be forced to stop doing business immediately, subject to a reorganizing

debtor's extortionate demand for a fresh payment for a right previously conveyed.

Such a result is not only inconsistent with the plain text of Section 365(g), but it also violates the cardinal principle, stated in *Butner v. United States*, 440 U.S. 48, 55 (1979), that "[p]roperty interests are created and defined by [applicable non-bankruptcy law] [u]nless some federal interest requires a different result." Meanwhile, the uncertainty created around trademark licenses by the First Circuit's decision will have immediate, negative effects on commerce in those licenses, both in and out of bankruptcy. This Court should therefore grant certiorari and reaffirm the view that rejection of a contract does nothing more than discharge pre-petition contractual obligations. In addition, if the Court does grant the principal question presented, it should also grant certiorari on the second question, which raises a related issue regarding the scope of the protection that Congress provided in Section 365(n) to patent licensees whose license agreements are rejected in the licensor's bankruptcy.

ARGUMENT

I. The Decision Below Fundamentally Misunderstands The Role Of Rejection Under Section 365 In The Bankruptcy System.

Section 365 operates within, and is consistent with, an architectural principle of the Bankruptcy Code: Bankruptcy discharges unsecured debt claims, but respects pre-bankruptcy property rights. Upon discharge in bankruptcy, enforcement of most pre-petition personal obligations of the debtor for rights of

payment is enjoined. *See* 11 U.S.C. §524.[3] On the other hand, unless the Bankruptcy Code provides a specific avoiding power, non-debtor interests in the debtor's property are left undisturbed. For instance, a creditor's security interest in the debtor's property is respected through the priority of secured claims and the right to adequate protection. *Id.* §§361, 362(d), 506, 507(b).

The Bankruptcy Code does contain a number of specific "avoidance" powers that allow the trustee to recapture property transferred by the debtor pre-petition. These powers include the power to avoid unperfected transfers, 11 U.S.C. §544(a), the power to avoid preferences, *id.* §547, and the power to avoid fraudulent conveyances, *id.* §544(b) and §548. Note that these powers are all located in Subchapter III of Chapter 5 of the Code, the subchapter that defines the estate. By contrast, the power to "assume or reject" under Section 365 is in Subchapter IV of Chapter 3 of the Bankruptcy Code, which deals with the administrative powers of the trustee—here the power to breach or perform a contract. When Congress meant to create a "clawback" power, it knew how to label it, and where to put it.

Section 365 is not one of those avoidance powers. Instead, it addresses the debtor's contractual rights and obligations without disturbing non-bankruptcy property rights. Insolvent debtors in bankruptcy are, by definition, unable to satisfy all of their obligations.

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[3] As will be discussed later, by contrast, the obligations of third parties owed to the debtor are assets that become property of the estate. 11 U.S.C. §541.

The Bankruptcy Code must thus determine the consequences of claims for breach of contract, whether in liquidation or reorganization. Where the obligation is the payment of a debt, that question is answered by the claims allowance process. 11 U.S.C. §§101(5), 501, 502, 503, 506, 507. Where contract obligations of the debtor ("claims" of creditors) are intertwined with conditional obligations of non-debtors ("assets"), the allocation of those rights and obligations is handled by Section 365.

A. The Rejection Of A Contract Under Section 365(a) Is A Breach.

Section 365 gives the debtor the choice between performance and breach. If the debtor elects to breach (*i.e.*, "rejects" the contract), Section 365(g) treats that breach as a pre-petition claim for damages that can be discharged: "[T]he rejection of an executory contract ... of the debtor constitutes a breach of such contract." 11 U.S.C. §365(g). Alternatively, a debtor that wishes to receive the benefit of the counter-party's remaining performance obligations under the contract can elect to reaffirm its own obligations under the contract (*i.e.*, "assume" the contract). This allows the debtor to preserve valuable contracts for the benefit of the bankruptcy estate. Thus, rejection is a breach while assumption reaffirms the obligation to perform. Neither act disturbs or unwinds any previous performance under the contract, nor does it reclaim any value conferred or any property already transferred.

This case principally involves an agreement that includes a trademark license—the contractual grant of a right to sell trademarked goods under the terms of

that license. The debtor/licensor rejected that agreement. The question is whether the rejection deprived the licensee of the right it already held to sell trademarked goods or, put another way, whether it revoked the licensee's defense against any claim of infringement by any other party. The key point relevant to that question is that the debtor/licensor's rejection of a license agreement constitutes a failure to perform—a breach of the *licensor's* obligations under the agreement, and nothing more. It is not a revocation or rescission of the contract, and it does not operate to retroactively invalidate either the grant of the license or the resulting defense the licensee holds against an infringement action by anyone else.

Simple examples illustrate the importance of this distinction. Consider a solvent merchant who sells a laptop along with warranties and a service contract, delivers the laptop, and then breaches by failing to perform the ongoing warranties and/or service obligations. The breach would not "unsell" the laptop. Similarly, if the seller were to file for bankruptcy, rejection of the contract by the seller/debtor would free the debtor of its warranty obligations and obligations under the service contract, but it would not undo the sale and entitle the debtor to get the laptop back.

A trademark license similarly grants the licensee the right to use the trademark under certain conditions and a defense against an infringement lawsuit brought by anyone (including non-parties) for any covered use.[4] The licensor may have other ongoing obligations, too—akin to the service and warranty obligations above—but if the licensor fails to perform on

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[4] A defense against a claim of counterfeiting, for example.

those obligations under the license (*i.e.*, "breaches"), the license will nonetheless continue to operate as a defense against any claim of infringement, provided that the licensee continues to live up to its own obligations under the license.

The same result is specified by Section 365(g) if the breach occurs through rejection in the bankruptcy context; the debtor/licensor's rejection is simply given effect as a breach of the debtor's obligations under the license agreement as of the bankruptcy petition date. This assures that the licensee will have an allowed claim that receives its *pro rata* distribution, along with other unsecured creditors, but it most certainly does not retract the grant of the license. As with the laptop, the effects of the licensor's breach on the licensee's rights and obligations are determined under non-bankruptcy law and not altered by the Bankruptcy Code. That simple, intuitive conclusion is the sole import of Section 365(g).

B. *Lubrizol* Was Wrongly Decided.

In a number of decided cases, however, the interaction between the debtor's contract obligations and the settled rights of non-debtors have become entangled. The result has been case law that is confusing at best and misguided at worst. This case implicates perhaps the most infamous example of both confusion and error, *Lubrizol Enterprises, Inc. v. Richmond Metal Finishers, Inc.*, 756 F.2d 1043 (4th Cir. 1985). In that case, the Fourth Circuit ignored the text of Section 365(g) and concluded that rejection of a patent license allowed the debtor/licensor to revoke the right to use a patented process, even if the non-debtor/licensee continued paying under the contract. *Id.* at 1047-48. This

rule had the harsh effect of turning a licensee into an infringer, subject to the severe remedies provided for patent infringement or needing to sign a fresh license to continue a line of business it had already paid to pursue.

Congress quickly acted to correct the error by enacting 11 U.S.C. §365(n) to protect patent and copyright licensees. That subsection reaffirmed the rule that rejection does not terminate a contract counterparty's ability to use intellectual property already transferred under the contract, and covered the principal types of intellectual property covered by the *Lubrizol* precedent. In Section 365(n), Congress made it clear that rejection pursuant to Section 365 could not unmake property rights in technology licenses involving patents and copyrights. Instead, upon rejection by the debtor/licensor, the licensee was given the option to treat the license as terminated or to continue to use the licensed intellectual property and pay royalties (less any damages for the licensor's breach).[5]

Congress did not expressly specify this same result for breaches of trademark licenses, as trademark rights are not listed in the definition of "intellectual property" contained in 11 U.S.C. §101(35A). But *Lubrizol* did not involve trademarks, so the need to act was not present. Crucially, Congress reaffirmed the background rule stated in Section 365(g) itself, and

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[5] It is important to note here that this is precisely the result that would obtain if a debtor were to breach a contract under state law. If the non-debtor's performance were conditioned on the debtor's continuing to perform, the non-debtor would have the option to treat the contract as repudiated, and discontinue its own performance.

therefore the basic principles applicable to other contracts—trademark licenses included.

The Seventh Circuit recognized as much in *Sunbeam Products, Inc. v. Chicago American Manufacturing, LLC*, 686 F.3d 372, 377 (7th Cir. 2012) (Easterbrook, J.). In so doing, it affirmed the view that *Lubrizol* had been wrong, and that rejection under Section 365(g) is merely a pre-petition breach. *Sunbeam*, like this case, involved rejection of a trademark license. *Id.* at 374-75. There the court held that, even though Section 365(n) does not mention trademark, Section 365(g) makes it clear that while rejection frees the debtor/licensor of its *own* obligations under the trademark license, it does not revoke the rights of the licensee to continue to use the trademark pursuant to, and so long as it complies with, the terms of the license. *Id.* at 376-77.

The *Sunbeam* court's rejection of *Lubrizol* is consistent with the view of virtually every scholar who has opined on the topic: The power to reject does not give the debtor the unilateral right to take back a property right that has already been transferred. Indeed, there is a substantial academic literature on this point, and an unusual scholarly consensus that predates the Seventh Circuit's *Sunbeam* decision and remains in place to this day.

Shortly after *Lubrizol* was decided, professors Westbrook and Andrew wrote a series of influential articles that explained why, as a matter of statutory interpretation, history, and policy, the effect of rejection is simply to create a breach and to establish the timing of that breach as the moment before the petition. *See* Westbrook, *supra*; Andrew, *supra*. Section 365(g) says so, in so many words. While Westbrook and Andrew

each took different routes to this result, they agreed that once a debtor files for bankruptcy, the trustee or debtor-in-possession has the obligation to decide whether it is better for the estate for the debtor to perform or breach a contract. *See* Westbrook, *supra*; Andrew, *supra*. This is true as a simple matter of logic.[6] As Andrew puts it, "[r]ejection of the contract by the estate—the estate's decision not to assume—is not a rescission or cancellation of the contract. It is merely the estate's decision not to become obligated on it." Andrew, *supra*, at 921 (footnote omitted). Or, as Westbrook (more functionally) puts it, the bankruptcy terms "assumption and rejection represent the decision to perform or breach."[7] The question then becomes the consequence of that failure to perform. If the debtor "rejects," any claim for damages arising from the breach is treated as a pre-petition claim,[8] allowing it to be discharged through the ordinary claims-

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[6] Indeed, a recent article argues that, as a practical matter, Section 365 might not even be necessary to administer the consequences of rejection. *See* John A.E. Pottow, *A New Approach to Executory Contracts*, 96 Tex. L. Rev. 1437 (2018). This Court need not go that far, but the argument illustrates the extent to which the *Lubrizol* approach deviates from the underlying principles of the Bankruptcy Code.

[7] Westbrook, *supra*, at 231.

[8] Rejection is the estate's determination "not to assume the contract or lease, and its occurrence triggers the ancillary rule that a 'breach' of the debtor's obligations will be deemed to have occurred as of the commencement of bankruptcy, thus permitting a claim by the non-debtor." Andrew, *supra*, at 881; *see also* Michael T. Andrew, *Executory Contracts Revisited: A Reply to Professor Westbrook*, 62 U. Colo. L. Rev. 1, 8 (1991) ("Rejection has the consequence of creating a deemed breach of the contract as of the date of bankruptcy so that there will be no question but that

administration process. Further, both agree that the consequence of breach should be determined by applicable *non*-bankruptcy law (principally, state contract law) and that *Lubrizol* was thus wrongly decided insofar as it made the consequence of rejection a bankruptcy-specific question. Andrew, *supra*, at 916-18; Westbrook, *supra*, at 305-11.

A critical consequence of this view is that, but for *Lubrizol*, Section 365(n) would have been unnecessary. Since rejection is breach, not revocation, rejection would not rescind the license. As Andrew and Westbrook noted, there is no federal bankruptcy law answer to the question of what happens to a license when the debtor breaches. Instead, one would look to applicable non-bankruptcy law—to the law of trademark and contract and to the terms of the license—to determine the consequences of the licensor's failure to perform its ongoing obligations. In simple terms, the consequences of breaching a trademark license are ordinary questions of contract interpretation, not federal bankruptcy law. Congress enacted Section 365(n) to correct *Lubrizol*'s misunderstanding of that basic principle for copyright and patent—the property covered by the *Lubrizol* precedent. Trademark licensees are not included in that provision, but neither were they covered by *Lubrizol*; legislative correction was, therefore, unnecessary. The basic principle that rejection is merely a breach—reaffirmed in Section 365(n)—means that rejection does not terminate or rescind a

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the non-debtor party has a claim" for breach of contract, and "whether the contract is 'executory' or not, the result" of rejection creates a claim against the estate.).

trademark license any more than any other type of intellectual property license.

The remarkable thing is that in the twenty years since Westbrook and Andrew wrote, there has been virtually no scholarly disagreement on this point.[9]

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[9] The articles reviewed are collected here: Andrew, *supra*, at 881, 921, 923; Westbrook, *supra*, at 231, 324; J. Dianne Brinson, *Software Distribution Agreements and Bankruptcy: The Licensor's Perspective*, 64 Wash. L. Rev. 499, 513-14 (1989); John J. Fry, *The Rejection of Executory Contracts Under the Intellectual Property Bankruptcy Protection Act of 1988*, 37 Clev. St. L. Rev. 621, 625-26 (1989); Michael T. Andrew, *Executory Contracts Revisited: A Reply to Professor Westbrook*, 62 U. Colo. L. Rev. 1, 8 (1991); Robert T. Canavan, *Unsolved Mysteries of Section 365(n) – When a Bankrupt Technology Licensor Rejects an Agreement Granting Rights to Future Improvements*, 21 Seton Hall L. Rev. 800, 806 (1991); Scott A. Steinberg & Michael A. Gerber, *Software Licensing: Protecting Intellectual Property in Bankruptcy*, 6 J. Bankr. L. & Prac. 535, 539 (1997); Alison J. Winick, *Can Superstars Really Sing the Blues? An Argument for the Adoption of an Undue Hardship Standard When Considering Rejection of Executory Personal Services Contracts in Bankruptcy*, 63 Brook. L. Rev. 409, 420 (1997); Shubha Ghosh, *The Morphing of Property Rules and Liability Rules: An Intellectual Property Optimist Examines Article 9 and Bankruptcy*, 8 Fordham Intell. Prop. Media & Ent. L.J. 99, 146, 149 (1997); Richard M. Cieri, Neil P. Olack & Joseph M. Witalec, *Protecting Technology and Intellectual Property Rights When a Debtor Infringes on Those Rights*, 8 Am. Bankr. Inst. L. Rev. 349, 355-56 (2000); Xuan-Thao N. Nguyen, *Bankrupting Trademarks*, 37 U.C. Davis L. Rev. 1267, 1286-87 (2004); Grant Hanessian, Michael A. Stoker & Joseph Samet, *When Worlds Collide: Intellectual Property and Arbitration Rights in Bankruptcy Cases*, 59-Oct. Disp. Resol. J. 27, 28-29 (2004); Peter S. Menell, *Bankruptcy Treatment of Intellectual Property Assets: An Economic Analysis*, 22 Berkeley Tech. L.J. 733, 767-68 (2007); Jonathan C. Balfus, *Exide Inside Out: New Third Circuit Decision Preserves Trademark Licensee's Rights Following Licensor's Rejection Under Bankruptcy Code § 365*,

The literature is collected in the margin below, but the point is that, with the exception of one article cited by the First Circuit, nobody disagrees. *See* James M. Wilton & Andrew G. Devore, *Trademark Licensing in the Shadow of Bankruptcy*, 68 Bus. Law. 739, 771-76 (2013).[10] For historical reasons articulated by Andrew

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31 Cal. Bankr. J. 523, 525 (2010); Ron E. Meisler, Elaine D. Ziff, Tracy C. Gardner & Carl T. Tullson, *Rejection of Intellectual Property License Agreements Under Section 365(n) of the Bankruptcy Code: Still Hazy After All These Years*, 19 J. Bankr. L. & Prac. 2 Art. 4, at 1 (2010); Bradley Scott Friedman, *Taking the Intellectual Out of Intellectual Property Licenses Under Section 365 of the Bankruptcy Code*, 20 J. Bankr. L. & Prac. 6 Art. 3, at 4 (2011); Jonathan C. Bolton & Martin S. Loui, *Intellectual Property Considerations in Times of Financial Distress*, 17-Feb. Haw. B.J. 4, 6 (2013); Zachary S. McKay, *A Dramatic Misconception: Why the Trademark Licensee Must Be Granted the Power to Overcome the Trustee in Bankruptcy's 11 U.S.C. § 365 Rejection*, 54 S. Tex. L. Rev. 747, 774-75 (2013); Peter M. Gilhuly, Kimberly A. Posin & Ted A. Dillman, *Intellectually Bankrupt?: The Comprehensive Guide to Navigating IP Issues in Chapter 11*, 21 Am. Bankr. Inst. L. Rev. 1, 36-37 (2013); Alan N. Resnick, Sunbeam *Offers a Ray of Sunshine for the Licensee When a Licensor Rejects a Trademark License Agreement in Bankruptcy*, 66 SMU L. Rev. 817, 821, 839 (2013); Tyler S. Dischinger, *Problems in the Code, Section 365(n): A Call for Clarity*, 32-8 Am. Bankr. Inst. J. 50, 51 (2013); Jason Enright, *The Bankruptcy Code's Rejection of Trademark Under § 365(n) and the Motley Consequences When a Debtor Rejects a High-Tech Trademark License*, 1 Bus. & Bankr. L.J. 75, 84-85 (2014); Peter C. Blain, *Trademarks and Distribution Rights in Bankruptcy: The Dissonance Continues*, 29 No. 3 Intell. Prop. & Tech. L.J. 10, 12-13 (2017); Westbrook & White, *supra*, at 554.

[10] There, the authors principally argue that the Andrew article ought to be disregarded because it is old. They then argue that trademarks are different from other forms of IP, which nobody disputes. They make no argument, however, as to why their trademark-specific concerns are best addressed by a *bankruptcy-*

and statutory and policy reasons articulated by Westbrook, rejection simply constitutes a breach—nothing more, and certainly not a revocation of the entire contract.

As the foregoing suggests, the Bankruptcy Appellate Panel (BAP) correctly decided this case before the First Circuit's decision created the split this Court needs to resolve. The leading scholars have recognized as much. Recently, Professor Westbrook specifically addressed this case, and wrote approvingly of the BAP's opinion:

> [The BAP's opinion in] *In re Tempnology LLC*, supports the reasoning behind our approach. ... The [BAP] concluded that while trademarks and logos could not be retained as intellectual property under section 365(n) of the Code, the bankruptcy court erred in concluding that Mission had no rights in the trademarks and logos after rejection. Rejection did not vaporize these rights that were not addressed by section 365(n). Instead, "[w]hatever postrejection rights Mission retained in the Debtor's trademark and logo are governed by the terms of the Agreement and non-bankruptcy law." As we might put it, breach of contract (rejection's effect under section 365(g)) would not somehow entitle the debtor to void its original grant of rights under non-bankruptcy law, although it did permit the avoidance of various ongoing obligations.

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specific rule, let alone why they are well served by the *Lubrizol* approach.

Westbrook & White, *supra*, at 532-33 (footnotes omitted).

The *Sunbeam* decision recognized the same principle that rejection does not claw back a non-debtor's already transferred property rights. In contrast, *Lubrizol* and the First Circuit's decision in this case create an avoidance power where there was no congressional intent to do so.

II. There Is Now A Clear Circuit Split.

Notwithstanding the foregoing, Congress's omission of a specific rule governing trademarks from Section 365(n) has led to confusion in the lower courts—and now a clear circuit split—about the continued vitality of *Lubrizol* for trademarks.

A. Bankruptcy And District Courts Were Divided Over The Effect Of A Rejection Of A Trademark License.

Some lower courts have concluded that, because trademarks were omitted from Section 101(35A) and hence lie beyond the scope of Section 365(n), the rule of *Lubrizol* continued to control cases involving the rejection of trademark licenses. *See In re HQ Global Holdings, Inc.*, 290 B.R. 507, 513 (Bankr. D. Del. 2003); *see also In re Old Carco LLC*, 406 B.R. 180, 211 (Bankr. S.D.N.Y. 2009); *In re Centura Software Corp.*, 281 B.R. 660, 668-74 (Bankr. N.D. Cal. 2002); *In re Blackstone Potato Chip Co.*, 109 B.R. 557, 560 (Bankr. D.R.I. 1990). This approach is surprising because, even for the property rights specifically at issue in *Lubrizol*, that precedent never controlled outside the Fourth Circuit. Meanwhile, other lower courts had correctly focused on the effect of a breach under trademark law, leaving the non-debtor licensees' trademark

rights in place. *In re Crumbs Bake Shop, Inc.*, 522 B.R. 766, 772 (Bankr. D.N.J. 2014).

B. Until Now, However, No Circuit Court Had Followed *Lubrizol*.

The first court of appeals to squarely address this question after enactment of Section 365(n) was the Seventh Circuit in *Sunbeam*. That court declined to extend *Lubrizol*'s reasoning to cover trademarks. *Sunbeam*, 686 F.3d at 375-77. But the decision below has now resuscitated *Lubrizol*'s reasoning and created a clear split. Before the First Circuit's ruling here, given Congress's enactment of Section 365(n) and the vast weight of scholarly authority against *Lubrizol*'s reasoning, it was possible to believe that *Lubrizol*'s continued vitality was in doubt, and this Court's intervention would not be necessary on this issue. The decision below, however, makes clear that the disagreement among the federal courts will not resolve itself absent this Court's review.

C. The Split In Circuits Creates Commercial Uncertainty.

This circuit split creates substantial and harmful commercial uncertainty. Trademark rights are often granted on a long-term basis under which the licensee undertakes substantial investment in promoting and building a business around the trademarked good. Indeed, as a recent American Bankruptcy Institute report has noted, the use of a trademark may be crucial to the very viability of a non-debtor/licensee's business, such as a franchise or dealership.[11] It is thus

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[11] Comm'n to Study the Reform of Chapter 11, Am. Bankr. Inst., *2012-2014 Final Report and Recommendations* 127 (2014).

likely to be quite material to prospective licensees whether their rights to use a trademark will survive a bankruptcy by the licensor. In circuits where the rule is unsettled, these prospective licensees will struggle to correctly price their purchases because of the risk that their contract rights can be unilaterally revoked. This problem is compounded because a bankruptcy case can be filed in any jurisdiction where the debtor can meet the liberal requirements for venue. In fact, even if the debtor has a place of business in the Seventh Circuit, the creditor/licensee is located there, and the transaction occurred there, that provides no assurance that the bankruptcy will be filed in the Seventh Circuit and thus no clarity as to which rule will govern.

Indeed, even standing alone, the First Circuit's rule creates commercial uncertainty that is nonexistent under the correct rule, stated in *Sunbeam*. That is because it creates a crucial and disruptive discrepancy between treatment of trademarks in bankruptcy and out. Trademark licenses may contain important terms to protect the goodwill of the debtor/licensor's business, or the debtor may wish to sell the business as a whole along with its goodwill. Trademark law thus needs rules that account for possible breaches or changes in business arrangements by the licensor, and as with any common law field, those rules develop over time in ways specific to substantive trademark law. It may also be possible to write trademark license contracts that themselves account for the contingencies that parties can foresee. Crucially, these kinds of questions pose issues of ordinary contract interpretation and substantive trademark law, *not bankruptcy law*. Adding a second layer of bankruptcy rules will

increase uncertainty about the effect of rejection on these non-bankruptcy rights, while simultaneously stymying the appropriate growth of the non-bankruptcy law that should govern these situations. The Court should grant certiorari to resolve the split among the courts of appeals and dispel the damaging confusion that division has created.

D. Congress Did Not Wish To Displace Trademark Law.

The legislative history supports this view. To be sure, when Congress overruled *Lubrizol* in 1988 by adopting Sections 365(n) and 101(35A), it omitted trademarks from the definition of "intellectual property." The Seventh Circuit correctly recognized, however, that this was because *Lubrizol* did not apply to trademarks. Reversing it in that context was thus unnecessary. Instead, Congress called on courts to determine the consequence of breach in a common law fashion (in the absence of future legislation). The Senate Report says specifically:

> [T]he bill does not address the rejection of executory trademark, trade name or service mark licenses by debtor-licensors. While such rejection is of concern because of the interpretation of section 365 by the Lubrizol court and others, ... such contracts raise issues beyond the scope of this legislation. In particular, trademark, trade name and service mark licensing relationships depend to a large extent on control of the quality of the products or services sold by the licensee. Since these matters could not be addressed without more exten-

> sive study, it was determined to postpone congressional action in this area and to allow the development of equitable treatment of this situation by bankruptcy courts.

S. Rep. No. 100-505, at 5 (1988).

It is important to understand the logic behind this move. As the Senate Report notes, trademarks, trade names, and service marks raise similar issues to other forms of intellectual property, but also present important differences that arise from the association of the trademark with the debtor/licensor's goodwill. So Congress left it to courts to interpret Section 365(g) and determine the effect of the "breach" that a rejection creates—in the context of individual contractual agreements, applying the *non*-bankruptcy law of trademark and contract. Put another way, Congress wanted this area of the law to continue to develop as a matter of *non*-bankruptcy law, and so declined to supplant the governing substantive law with a uniform bankruptcy answer. Reading Section 365(n)'s omission of trademarks as *supplying* a uniform rule of revocability for trademark licenses not only overreads an omission, it gets the point of that omission exactly backwards.

As the BAP found below, and the Seventh Circuit found in *Sunbeam*, a contractual breach does not vaporize a trademark license, either as a matter of trademark or contract law. Accordingly, neither does rejection under Section 365.

In sum, the disagreement between the circuits admits of a fairly straightforward answer—indeed one that has been the subject of decades of academic agree-

ment—that is well laid out in the Seventh Circuit's decision in *Sunbeam*. The issue is thus ripe for resolution, with a clearly correct approach this Court can easily adopt. By clarifying that the effect of rejection is breach, using the language of Section 365(g) itself, this Court could increase commercial certainty, bring bankruptcy law more into line with and integrate it with other non-bankruptcy policies, and protect the legitimate expectations of debtors and non-debtors alike.

III. This Court Should Grant Certiorari To Determine The Status Of An Exclusivity Provision In A Patent License Under Section 365(n).

Finally, if this Court does grant the petition on the first question presented, it should also consider the second. That question involves the scope of protection granted to a territorial exclusivity provision in a patent license. As noted above, Section 365(n) provides that the holder of a rejected patent or copyright license may retain its "rights (including a right to enforce any exclusivity provision of such contract, but excluding any other right under applicable nonbankruptcy law to specific enforcement of such contract) ... to such intellectual property." Section 101(35A) defines "intellectual property" to include any "invention, process, [or] design ... protected by" the Patent Act, 35 U.S.C. §1 *et seq.*, which grants, among other things, the right to exclude others from selling a patented invention. The First Circuit held, however, that the exclusive right to sell a patented product in a particular geographic area and field of use is not a "right to intellectual property" protected by Section 365(n). Given that exclusive territorial distribution licenses often involve

both trademark and patent rights, as well as the close connection between bankruptcy law and intellectual property law as to these issues, Question 2 should also be addressed by the Court in this case.

CONCLUSION

For these reasons, we urge the Court to grant certiorari in this case.

Respectfully submitted,

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August 8, 2018

APPENDIX

APPENDIX

Amici, whose names and affiliations are set forth below, are law professors who study the United States' bankruptcy system and subscribe to the views stated in this amicus brief. They write solely based on their concern about the effect that the opinion below will have on this system. To the best of their knowledge, none of them have any financial interest in the outcome of this case:

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No. 17-1657

IN THE

Supreme Court of the United States

MISSION PRODUCT HOLDINGS, INC.,
Petitioner,

v.

TEMPNOLOGY, LLC, N/K/A OLD COLD LLC,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

JOINT APPENDIX
VOLUME I OF II (PAGES JA1-JA313)

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PETITION FOR CERTIORARI FILED JUNE 11, 2018
CERTIORARI GRANTED OCTOBER 26, 2018

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Order Regarding Motion of Mission Product Holdings, Inc. for Extension of Stay of Effectiveness of Order of the Court or, in the Alternative, Stay Pending Appeal, Bankr. Dkt. 577, filed October 31, 2018 598

DOCKET ENTRIES IN CASE NO. 16-9016 IN THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

12/07/2016 CIVIL CASE docketed. Notice of appeal filed by Appellant Mission Product Holdings, Inc.. Docketing Statement due 12/21/2016. Appearance form due 12/21/2016. PLEASE NOTE: The December 1, 2016 amendment to the Federal Rules of Appellate Procedure made significant changes to appellate practice. The full text of the amendments, as well as a summary of major rule changes, is available here. The changes went into effect on December 1, 2016. [16-9016] (GA) [Entered: 12/07/2016 08:51 AM]

12/21/2016 NOTICE of appearance on behalf of Appellant Mission Product Holdings, Inc. filed by Attorney Robert J. Keach, Esq.. Certificate of service dated 12/21/2016. [16-9016] (RJK) [Entered: 12/21/2016 02:58 PM]

12/21/2016 DOCKETING statement filed by Appellant Mission Product Holdings, Inc.. Certificate of service dated 12/21/2016. [16-9016] (RJK) [Entered: 12/21/2016 02:59 PM]

12/22/2016 NOTICE of appearance on behalf of Appellee Tempnology, LLC filed by Attorney Daniel W. Sklar. Certificate of service dated 12/22/2016. [16-9016] (DWS) [Entered: 12/22/2016 04:41 PM]

12/22/2016 NOTICE of appearance on behalf of Appellee Tempnology, LLC filed by Attorney Christopher Desiderio. Certificate of service dated 12/22/2016. [16-9016] (CMD) [Entered: 12/22/2016 04:46 PM]

01/10/2017 BRIEFING schedule set. Brief due 02/21/2017 for appellant Mission Product Holdings, Inc.. Appendix due 02/21/2017 for appellant Mission Product Holdings, Inc.. Pursuant to F.R.A.P. 31(a), appellee's brief will be due 30 days following service of appellant's brief and appellant's reply brief will be due 14 days following service of appellee's brief. PLEASE NOTE: The December 1, 2016 amendments to the Federal Rules of Appellate Procedure reduced the word limits for briefs. The full text of the amendments, as well as a summary of major rule changes, is available here. The changes went into effect on December 1, 2016. [16-9016] (GA) [Entered: 01/10/2017 02:53 PM]

02/21/2017 BRIEF tendered by Appellant Mission Product Holdings, Inc.. Certificate of service dated 02/21/2017. [16-9016] (RJK) [Entered: 02/21/2017 04:51 PM]

02/21/2017 CORPORATE disclosure statement filed by Appellant Mission Product Holdings, Inc. Certificate of service dated 02/21/2017. [16-9016] (EP) [Entered: 02/27/2017 11:07 AM]

02/24/2017 APPENDIX filed by Appellant Mission Product Holdings, Inc.. Number of volumes: 1. Number of copies: 5. Certificate of service dated 02/21/2017. [16-9016] (EP) [Entered: 03/01/2017 01:51 PM]

02/27/2017 APPELLANT'S BRIEF filed by Appellant Mission Product Holdings, Inc. Certificate of service dated 02/21/2017. Nine paper copies identical to that of the electronically filed brief must be submitted so that they are received by the court on or before 03/06/2017. Brief due 03/23/2017 for APPELLEE Tempnology, LLC. PLEASE NOTE: The December 1, 2016 amendments to the Federal Rules of Appellate Procedure reduced the word limits for briefs. The full text of the amendments, as well as a summary of major rule changes, is available here. The changes went into effect on December 1, 2016. [16-9016] (EP) [Entered: 02/27/2017 11:13 AM]

02/28/2017 NINE (9) paper copies of appellant/petitioner brief [6072277-2] submitted by Appellant Mission Product Holdings, Inc.. [16-9016] (CC) [Entered: 02/28/2017 03:43 PM]

03/23/2017 BRIEF tendered by Appellee Tempnology, LLC. Certificate of service dated 03/23/2017. [16-9016] (DWS) [Entered: 03/23/2017 02:56 PM]

03/27/2017 NOTICE of appearance on behalf of Appellee Tempnology, LLC filed by Attorney Lee Harrington. Certificate of service dated 03/27/2017. [16-9016] (LAH) [Entered: 03/27/2017 01:42 PM]

03/27/2017 APPELLEE'S BRIEF filed by Appellee Tempnology, LLC. Certificate of service dated 03/23/2017. Nine paper copies identical to that of the electronically filed brief must be submitted so that they are received by the court on or before 04/03/2017. Reply brief due 04/06/2017 for APPELLANT Mission Product Holdings, Inc. PLEASE NOTE: The December 1, 2016 amendments to the Federal Rules of Appellate Procedure reduced the word limits for briefs. The full text of the amendments, as well as a summary of major rule changes, is available here. The changes went into effect on December 1, 2016. [16-9016] (EP) [Entered: 03/27/2017 03:21 PM]

03/27/2017 CORPORATE disclosure statement filed by Appellee Tempnology, LLC. Certificate of service dated 03/23/2017. [16-9016] (EP) [Entered: 03/27/2017 03:22 PM]

03/29/2017 NINE (9) paper copies of appellee/respondent brief [6079211-2] submitted by Appellee Tempnology, LLC. [16-9016] (CC) [Entered: 03/29/2017 01:22 PM]

04/06/2017 BRIEF tendered by Appellant Mission Product Holdings, Inc.. Certificate of service dated 04/06/2017. [16-9016] (RJK) [Entered: 04/06/2017 10:18 AM]

04/06/2017 REPLY BRIEF filed by Appellant Mission Product Holdings, Inc. Certificate of service dated 04/06/2017. Nine paper copies identical to that of the electronically filed brief must be submitted so that they are received by the court on or before 04/13/2017. PLEASE NOTE: The December 1, 2016 amendments to the Federal Rules of Appellate Procedure reduced the word limits for briefs. The full text of the amendments, as well as a summary of major rule changes, is available here. The changes went into effect on December 1, 2016. [16-9016] (EP) [Entered: 04/06/2017 04:49 PM]

04/10/2017 NINE (9) paper copies of reply brief [6082203-2] submitted by Appellant Mission Product Holdings, Inc.. [16-9016] (CC) [Entered: 04/11/2017 08:44 AM]

08/07/2017 CASE calendared: Wednesday, 09/13/2017 AM Boston, MA Panel Courtroom. Designation form due 08/21/2017. [16-9016] (DT) [Entered: 08/07/2017 12:11 PM]

08/08/2017 DESIGNATION of attorney presenting oral argument filed by Attorney Lee A. Harrington for Appellee Tempnology, LLC. Certificate of service dated 08/08/2017. [16-9016] (LAH) [Entered: 08/08/2017 11:19 AM]

08/08/2017 DESIGNATION of attorney presenting oral argument filed by Attorney Robert James Keach for Appellant Mission Product Holdings, Inc.. Certificate of service dated 08/08/2017. [16-9016] (RJK) [Entered: 08/08/2017 01:48 PM]

08/30/2017 ORDER entered by William J. Kayatta, Jr., Appellate Judge: Each party is ordered to submit by 12:00 noon on Friday, September 8, 2017, a letter of no more than twelve pages addressing whether all exclusivity and trademark rights, even if preserved under 11 U.S.C. § 365(n), have now expired, rendering the disputes in this case moot, given that the wind-down period of the Co-Marketing and Distribution Agreement (the "Agreement") expired on July 1, 2016. [16-9016] (GA) [Entered: 08/30/2017 10:07 AM]

09/08/2017 LETTER regarding *Response to August 30, 2017 Order of the Court [Document No. 00117195483]* filed by Attorney Robert James Keach for Appellant Mission Product Holdings, Inc.. Certificate of service dated 09/08/2017. [16-9016] (RJK) [Entered: 09/08/2017 10:23 AM]

09/08/2017 LETTER regarding *Response to Court Order dated August 30, 2017 [Document No. 00117195483]* filed by Attorney Daniel W. Sklar for Appellee Tempnology, LLC. Certificate of service dated 09/08/2017. [16-9016] (DWS) [Entered: 09/08/2017 11:44 AM]

09/13/2017 CASE argued. Panel: Juan R. Torruella, Appellate Judge; Sandra L. Lynch, Appellate Judge and William J. Kayatta, Jr., Appellate Judge. Arguing attorneys: Robert James Keach for Mission Product Holdings, Inc. and Lee A. Harrington for Tempnology, LLC. [16-9016] (DT) [Entered: 09/13/2017 11:32 AM]

01/12/2018 OPINION issued by Juan R. Torruella, Appellate Judge; Sandra L. Lynch, Appellate Judge and William J. Kayatta, Jr., Appellate Judge. Published. [16-9016] (GA) [Entered: 01/12/2018 04:14 PM]

01/12/2018 JUDGMENT entered: This cause came on to be heard on appeal from the Bankruptcy Appellate Panel for the First Circuit and was argued by counsel. Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The bankruptcy court's decision is affirmed. [16-9016] (GA) [Entered: 01/12/2018 04:15 PM]

01/29/2018 MANDATE issued. [16-9016] (GA) [Entered: 01/29/2018 09:57 AM]

04/09/2018 U.S. SUPREME COURT ORDER entered. The application for an extension of time within which to file a petition for a writ of certiorari was granted. [16-9016] (GA) [Entered: 04/11/2018 09:52 AM]

06/12/2018 U.S. SUPREME COURT NOTICE advising a petition for a writ of certiorari was filed on 06/11/2018 and assigned case number 17-1657. [16-9016] (GA) [Entered: 06/20/2018 08:37 AM]

06/18/2018 ERRATA issued by court to opinion (published) [6143633-2]. [16-9016] (SBT) [Entered: 06/18/2018 12:37 PM]

10/26/2018 U.S. SUPREME COURT ORDER entered on 10/26/2018. The petition for a writ of certiorari is granted limited to Question 1 presented by the petition. [16-9016] (GRC) [Entered: 11/08/2018 04:56 PM]

DOCKET ENTRIES IN CASE NO. 15-065 BEFORE THE UNITED STATES BANKRUPTCY APPELLATE PANEL FOR THE FIRST CIRCUIT

11/13/2015	Received Notice of Appeal filed at U.S. Bankruptcy Court, District of New Hampshire on 11/12/2015, transmittal form, FILED. CM/ECF: Counsel must register for a First Circuit BAP CM/ECF Appellate Filer Account at http://pacer.psc.uscourts.gov/emecf. Counsel shall also review the BAP's requirements for electronic filing by visiting the BAP's PACER/CMECF Information section at http://www.bap1.uscourts.gov. Pro se parties may not file documents electronically. [15-65] [Entered: 11/13/2015 11:11 AM]
11/18/2015	OPENING LETTER: Notice to all parties RE: BAP No. NH 15-065 assigned. [15-65] [Entered: 11/18/2015 10:49 AM]
12/14/2015	Complete Certificate of Readiness received from U.S. Bankruptcy Court, District of New Hampshire. [15-65] [Entered: 12/14/2015 04:38 PM]
12/14/2015	Certificate of Readiness docketed. [15-65] [Entered: 12/14/2015 04:38 PM]

12/15/2015	BRIEFING ORDER ENTERED: Brief due 01/14/2016 for Appellant Mission Product Holdings, Inc.. Appellee Tempnology LLC.'s brief due within 30 days after service of Appellant's brief. Appellant Mission Product Holdings, Inc.'s reply brief due within 14 days after service of the Appellee's brief. [15-65] [Entered: 12/15/2015 04:02 PM]
01/14/2016	Brief tendered by Appellant Mission Product Holdings, Inc. [15-65] [Entered: 01/14/2016 05:46 PM]
01/14/2016	Appellant Mission Product Holdings, Inc. appendix filed. [15-65] [Entered: 01/14/2016 05:57 PM]
01/14/2016	Appellant Mission Product Holdings, Inc.'s Brief filed. [15-65] [Entered: 01/15/2016 04:12 PM]
02/15/2016	Brief tendered by Appellee Tempnology LLC [15-65] [Entered: 02/15/2016 11:06 AM]
02/15/2016	Appellee Tempnology LLC's Brief filed. [15-65] [Entered: 02/16/2016 12:08 PM]
02/29/2016	Reply Brief tendered by Appellant Mission Product Holdings, Inc. [15-65] [Entered: 02/29/2016 04:23 PM]

05/31/2016 ORAL ARGUMENT SCHEDULING ORDER ENTERED. This case is scheduled for oral argument on 07/18/2016 at 11:00 am, Courtroom 5, 12th Floor, McCormack P.O. & Court House, Boston, MA. [15-65] [Entered: 05/31/2016 03:14 PM]

05/31/2016 Notice of Oral Argument. Oral Argument Set for 11:00 a.m., 07/18/2016. Response to Notice deadline is 6/14/16. [15-65] [Entered: 05/31/2016 03:15 PM]

06/13/2016 Confirmation of oral argument filed by Appellant Mission Product Holdings, Inc. [15-65] [Entered: 06/13/2016 02:29 PM]

06/14/2016 Confirmation of oral argument filed by Appellee Tempnology LLC [15-65] [Entered: 06/14/2016 11:38 AM]

07/12/2016 ORAL ARGUMENT SCHEDULING ORDER ENTERED: This case is scheduled for oral argument at 11:00 a.m. on 07/18/2016 in Courtroom 5, 12th Floor, McCormack P.O. & Court House, Boston, MA. [15-65] [Entered: 07/12/2016 01:46 PM]

07/12/2016 Attorney Michael A. Siedband for Appellant Mission Product Holdings, Inc. in 15-65 terminated. Automatic email reply states Siedband is no longer associated with Bernstein Shur. [15-65] [Entered: 07/12/2016 03:39 PM]

07/18/2016 LAMOUTTE, HOFFMAN and CARY, U.S. Bankruptcy Appellate Panel Judges. APPEAL ARGUED AND SUBMITTED THIS DAY. [15-65] [Entered: 07/18/2016 03:45 PM]

11/18/2016 LAMOUTTE, HOFFMAN and CARY, U.S. Bankruptcy Appellate Panel Judges: Opinion issued. AFFIRMED IN PART and REVERSED IN PART. For publication. Hoffman authoring Judge. [15-65] [Entered: 11/18/2016 02:33 PM]

11/18/2016 LAMOUTTE, HOFFMAN and CARY, U.S. Bankruptcy Appellate Panel Judges: JUDGMENT FILED AND ENTERED. AFFIRMED IN PART and REVERSED IN PART. [15-65] [Entered: 11/18/2016 02:35 PM]

11/22/2016 Notice of Appeal to the U.S. Court of Appeals for the First Circuit filed by Mission Product Holdings, LLC. [15-65] [Entered: 11/22/2016 03:39 PM]

11/22/2016 Notice of filing of appeal to U.S. Court of Appeals for the First Circuit sent to U.S. Bankruptcy Court, District of New Hampshire. [15-65] [Entered: 11/22/2016 04:23 PM]

11/28/2016 Notice of Appeal sent to U.S. Court of Appeals for the First Circuit on 11/28/2016. [15-65] [Entered: 11/28/2016 03:13 PM]

11/29/2016	Received U.S. Court of Appeals for the First Circuit case number: 16-9016. [15-65] [Entered: 11/29/2016 11:35 AM]
11/29/2016	U.S. Court of Appeals for the First Circuit fee paid. Receipt No. 4701000130. [15-65] [Entered: 11/30/2016 02:03 PM]
10/26/2017	NOTICE Regarding Relocation. Notice notifying parties of BAP's new location as of 11/20/17. [15-65] [Entered: 10/26/2017 12:29 PM]
01/29/2018	Received U.S. Court of Appeals for the First Circuit Mandate for Case No. 16-9016. [15-65] [Entered: 01/30/2018 03:01 PM]
02/13/2018	BAP Mandate Issued. Notice of entry of judgment to Hon. Christopher J. Panos, Clerk, U.S. Bankruptcy Court, District of New Hampshire and parties. [15-65] [Entered: 02/13/2018 11:53 AM]

DOCKET ENTRIES IN CASE NO. 15-11400 IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF NEW HAMPSHIRE

09/01/2015	1 (34 pgs)	Chapter 11 Voluntary Petition. Fee Amount $1717 Filed by Tempnology LLC, Chapter 11 Plan due by 12/30/2015. Disclosure Statement due by 12/30/2015. (Sklar, Daniel) Modified on 9/4/2015 to correct Debtor filer per court order entered 9/3/2015 (mjc). (Entered: 09/01/2015)
09/01/2015	2	Receipt of Voluntary Petition (Chapter 11)(15-11400) [misc,volp11] (1717.00) filing fee. Receipt number 2979395, Fee amount $1717.00. (re: Doc#1). (U.S. Treasury) (Entered: 09/01/2015)
09/01/2015	3	Judge Bruce A. Harwood assigned to case. (hk) (Entered: 09/01/2015)
09/01/2015	4 (2 pgs)	Notice of Appearance and Request for Notice by Christopher M. Candon Filed by Creditor Schleicher & Stebbins Hotels, L.L.C. (Candon, Christopher) Modified on 9/1/2015 to correct party filer(jtp). (Entered:

09/01/2015)

09/01/2015	5 (4 pgs)	Statement of Limitations, Methodology and Disclaimer Regarding Debtor's Statement of Financial Affairs with Schedules Filed by Debtor Tempnology LLC (RE: related document(s) 1 Voluntary Petition (Chapter 11) filed by Debtor Tempnology LLC, dba Coolcore) (Sklar, Daniel) Modified on 9/4/2015 to correct Debtor filer per court order entered 9/3/2015 (mjc). (Entered: 09/01/2015)
09/01/2015	6 (2 pgs)	List of 20 Largest Unsecured Creditors Filed by Debtor Tempnology LLC (Sklar, Daniel) Modified on 9/4/2015 to correct Debtor filer per court order enterd 9/3/2015 (mjc). (Entered: 09/01/2015)
09/01/2015	7 (27 pgs; 4 docs)	Motion *of Debtor for Entry of Interim and Final Orders, Pursuant to Bankruptcy Code Sections 105(a), 345(b), 363(c)(1), 364(a), 364(b), and 503(b)(1) and Bankruptcy Rules 6003 and 6004, (A) Authoriziing Debtor to Use Existing Cash Management System, (B) Authorizing and Directing Banks and Financial Institu-*

		tions to Honor and Process Checks and Transfers, and (C) Authorizing Debtor to Use Existing Bank Accounts and Existing Busiiness Forms Filed by Debtor Tempnology LLC (Attachments: # 1 Exhibit A - Bank Accounts # 2 Exhibit B - Proposed Interim Order # 3 Exhibit C - Proposed Final Order) (Sklar, Daniel) Modified on 9/4/2015 to correct Debtor filer per court order entered 9/3/2015(mjc). (Entered: 09/01/2015)
09/01/2015	8 (1 pg)	Order Setting Last Day To File Proofs of Claim Signed on 9/1/2015 Proofs of Claims due by 12/30/2015. Government Proof of Claim due by 2/29/2016. (jtp) (Entered: 09/01/2015)
09/01/2015	9 (1 pg)	Notice to Debtor to File Schedules and Statements. Certain schedules and statements were not filed with the voluntary petition and are required to be filed by the date indicated under Federal Rule of Bankruptcy Procedure 1007 and Local Bankruptcy Rule 1007-1. Failure to file the documents required by 11 U.S.C. Section 521(a)(1) and Local Bankruptcy Rule 1007-1 will result in

		the issuing of a Clerks Notice of Dismissal (Contingent). (RE: related document(s)1 Voluntary Petition (Chapter 11) filed by Debtor Tempnology LLC, dba Coolcore). Verified Stmt. re List of Creditors due by 9/15/2015. List of creditors due by 9/15/2015. List of Equity Security Holders due by 9/15/2015. Debtor Organizational Documents due by 9/15/2015. Statement of Parent/Public Companies due by 9/15/2015. Incomplete Filings due by 9/15/2015. (jtp) (Entered: 09/01/2015)
09/01/2015	10 (28 pgs; 3 docs)	Motion *OF DEBTOR PURSUANT TO BANKRUPTCY CODE SECTIONS 105(a), 363(b), 503(b), 507(a)(4), AND 507(a)(8) AND BANKRUPTCY RULES 6003 AND 6004, FOR ENTRY OF INTERIM AND FINAL ORDERS (I) AUTHORIZING DEBTOR TO (A) PAY CERTAIN EMPLOYEE COMPENSATION AND BENEFITS, AND (B) MAINTAIN SUCH EMPLOYEE BENEFITS PROGRAMS; AND (II) AUTHORIZING AND DIRECTING BANKS AND*

		FINANCIAL INSTITUTIONS TO HONOR AND PROCESS CHECKS AND TRANSFERS RELATED TO SUCH OBLIGATIONS Filed by Debtor Tempnology LLC (Attachments: # 1 Proposed Order Exhibit A - Interim # 2 Proposed Order Exhibit B - Final) (Sklar, Daniel) Modified on 9/4/2015 to correct Debtor filer per court order entered 9/3/2015 (mjc). (Entered: 09/01/2015)
09/01/2015	11 (24 pgs; 5 docs)	Motion ***OF DEBTOR PURSUANT TO BANKRUPTCY CODE SECTIONS 105(a) AND 366 (A) APPROVING DEBTORS PROPOSED ADEQUATE ASSURANCE OF PAYMENT TO UTILITY COMPANIES, AND(B) PROHIBITING UTILITY COMPANIES FROM ALTERING, REFUSING OR DISCONTINUING SERVICE*** Filed by Debtor Tempnology LLC (Attachments: # 1 Proposed Order A - Interim # 2 Exhibit 1 to Interim Proposed Order # 3 Proposed Order B - Final # 4 Exhibit 1 to Proposed Final Order) (Sklar, Daniel) Modified on 9/4/2015 to correct Debtor

		filer per court order entered 9/3/2015 (mjc). (Entered: 09/01/2015)
09/01/2015	12 (13 pgs; 2 docs)	Motion *For An Order Under Bankruptcy Code Sections 105(a), 363(b), 506, 1107(a) And 1108 Authorizing Payment Of Certain Prepetition Shipping, Warehousing, And Delivery Charges* Filed by Debtor Tempnology LLC (Attachments: # 1 Proposed Order) (Sklar, Daniel) Modified on 9/4/2015 to correct Debtor filer per court order entered 9/3/2015(mjc). (Entered: 09/01/2015)
09/01/2015	13 (11 pgs; 2 docs)	Motion *to Honor Returns and Exchanges* Filed by Debtor Tempnology LLC (Attachments: # 1 Proposed Order) (Sklar, Daniel) Modified on 9/4/2015 to correct Debtor filer per court order entered 9/3/2015(mjc). (Entered: 09/01/2015)
09/01/2015		Pursuant to 11 U.S.C. Sec. 341(a) the United States Trustee has scheduled the meeting of creditors to take place on 9/23/2015 at 10:00 A.M. at the following location: 1000 Elm Street, Rm. 702, Manchester, NH 03101. Filed by

		U.S. Trustee Office of the U.S. Trustee (Dirsa, Ann) (Entered: 09/01/2015)
09/01/2015	14 (159 pgs; 5 docs)	Motion for Adequate Protection *and Scheduling of a Final Hearing*, Motion to Use Cash Collateral *and Authorizing Debtor to Obtain Post-Petition Financing* Filed by Debtor Tempnology LLC (Attachments: # 1Proposed Order A - Interim # 2 Proposed Order B - Final # 3 Exhibit C - Credit Agreement # 4 Exhibit D - Budget) (Sklar, Daniel) Modified on 9/4/2015 to correct Debtor filer per court order entered 9/3/2015(mjc). (Entered: 09/01/2015)
09/01/2015	15 (2 pgs)	Notice of Hearing Filed by Debtor Tempnology LLC, dba Coolcore (RE: related document(s) 7 Motion filed by Debtor Tempnology LLC, dba Coolcore, 10 Motion filed by Debtor Tempnology LLC, dba Coolcore, 11Motion filed by Debtor Tempnology LLC, dba Coolcore, 12 Motion filed by Debtor Tempnology LLC, dba Coolcore, 13 Motion filed by Debtor Tempnology LLC 14 Motion for Adequate

		Protection filed by Debtor Tempnology LLC, dba Coolcore, Motion to Use Cash Collateral) Hearing scheduled for 9/3/2015 at 01:30 PM at Courtroom 1, 1000 Elm Street, 11th Floor, Manchester, NH. (Sklar, Daniel) Modified on 9/4/2015 to correct Debtor filer per court order entered 9/3/2015(mjc). (Entered: 09/01/2015)
09/01/2015	16 (16 pgs)	Statement of Declaration of Kevin McCarthy in Support of Debtor's First Day Pleadings Filed by Debtor Tempnology LLC (Sklar, Daniel) Modified on 9/4/2015 to correct Debtor filer per court order entered 9/3/2015 (mjc). (Entered: 09/01/2015)
09/01/2015	17 (7 pgs; 2 docs)	Motion to Expedite Hearing Filed by Debtor Tempnology LLC(RE: related document(s) 7 Motion filed by Debtor Tempnology LLC 10 Motion filed by Debtor Tempnology LLC 11 Motion filed by Debtor Tempnology LLC 12 Motion filed by Debtor Tempnology LLC 13 Motion filed by Debtor Tempnology LLC 14 Motion for Adequate Protection filed by Debtor Tempnology LLC Motion

		to Use Cash Collateral) (Attachments: # 1 Proposed Order Exhibit A) (Sklar, Daniel) Modified on 9/4/2015 to correct Debtor filer per court order entered 9/3/2015(mjc). (Entered: 09/01/2015)
09/02/2015	18 (2 pgs)	Meeting of Creditors. 341(a) meeting to be held on 9/23/2015 at 10:00 AM at Room 702, Seventh Floor, 1000 Elm Street, Manchester, NH. Proofs of Claims due by 12/30/2015. (jtp) (Entered: 09/02/2015)
09/02/2015	19 (2 pgs)	Order Granting Motion Expedite Hearing's (related document(s): 7 Motion filed by Debtor Tempnology LLC 10 Motion filed by Debtor Tempnology LLC 11 Motion filed by Debtor Tempnology LLC 12 Motion filed by Debtor Tempnology LLC 13 Motion filed by Debtor Tempnology LLC 14 Motion for Adequate Protection filed by Debtor Tempnology LLC Motion to Use Cash Collateral) Signed on 9/2/2015. Hearing scheduled for 9/3/2015 at 01:30 PM at Courtroom 1, 1000 Elm Street, 11th Floor, Manchester, NH. (jtp) Modified on 9/4/2015 to correct

		Debtor filer Re: Docs. 7-14 per court order entered 9/3/2015(mjc). (Entered: 09/02/2015)
09/02/2015	20	Hearing Set On (RE: related document(s)7 Motion filed by Debtor Tempnology LLC 10 Motion filed by Debtor Tempnology LLC 11 Motion filed by Debtor Tempnology LLC 12 Motion filed by Debtor Tempnology LLC 13 Motion filed by Debtor Tempnology LLC 14 Motion for Adequate Protection filed by Debtor Tempnology LLC Motion to Use Cash Collateral). Hearing scheduled for 9/3/2015 at 01:30 PM at Courtroom 1, 1000 Elm Street, 11th Floor, Manchester, NH. (jtp) Modified on 9/4/2015 to correct Debtor filer Re: Docs. 7-14 per court order entered 9/3/2015(mjc). (Entered: 09/02/2015)
09/02/2015	21	Hearing Set On (RE: related document(s)7 Motion filed by Debtor Tempnology LLC). Hearing scheduled for 9/3/2015 at 01:30 PM at Courtroom 1, 1000 Elm Street, 11th Floor, Manchester, NH. (jtp) Modified on 9/4/2015 to correct Debtor filer re: Doc. 7 per

		court order entered 9/3/2015 (mjc). (Entered: 09/02/2015)
09/02/2015	22	Hearing Set On (RE: related document(s)10 Motion filed by Debtor Tempnology LLC). Hearing scheduled for 9/3/2015 at 01:30 PM at Courtroom 1, 1000 Elm Street, 11th Floor, Manchester, NH. (jtp) Modified on 9/4/2015 to correct Debtor filer Re: Doc. 19 per court order entered 9/3/2015 (mjc). (Entered: 09/02/2015)
09/02/2015	23	Hearing Set On (RE: related document(s)11 Motion filed by Debtor Tempnology LLC). Hearing scheduled for 9/3/2015 at 01:30 PM at Courtroom 1, 1000 Elm Street, 11th Floor, Manchester, NH. (jtp) Modified on 9/4/2015 to correct Debtor filer Re: Doc. 11 per court order entered 9/3/2015 (mjc). (Entered: 09/02/2015)
09/02/2015	24	Hearing Set On (RE: related document(s)12 Motion filed by Debtor Tempnology LLC). Hearing scheduled for 9/3/2015 at 01:30 PM at Courtroom 1, 1000 Elm Street, 11th Floor, Manchester, NH. (jtp) Modified on 9/4/2015 to correct Debtor filer Re: Doc. 12 per court order entered 9/3/2015

(mjc). (Entered: 09/02/2015)

09/02/2015	25	Hearing Set On (RE: related document(s)14 Motion for Adequate Protection filed by Debtor Tempnology LLC, Motion to Use Cash Collateral). Hearing scheduled for 9/3/2015 at 01:30 PM at Courtroom 1, 1000 Elm Street, 11th Floor, Manchester, NH. (jtp) Modified on 9/4/2015 to correct Debtor filer Re: Doc. 14 per court order entered 9/3/2015 (mjc). (Entered: 09/02/2015)
09/02/2015	26 (2 pgs)	Amended Notice of Hearing Filed by Debtor Tempnology LLC (RE: related document(s) 7 Motion filed by Debtor Tempnology LLC10 Motion filed by Debtor Tempnology LLC 11 Motion filed by Debtor Tempnology LLC 12 Motion filed by Debtor Tempnology LLC 13 Motion filed by Debtor Tempnology LLC 14 Motion for Adequate Protection filed by Debtor Tempnology LLC Motion to Use Cash Collateral) Hearing scheduled for 9/3/2015 at 01:30 PM at Courtroom 1, 1000 Elm Street, 11th Floor, Manchester, NH. (Sklar, Daniel) Modified on 9/4/2015 to correct Debtor filer

		Re: Docs. 7-14 per court order entered 9/3/2015 (mjc). (Entered: 09/02/2015)
09/02/2015	27	Hearing Set On (RE: related document(s)13 Motion filed by Debtor Tempnology LLC). Hearing scheduled for 9/3/2015 at 01:30 PM at Courtroom 1, 1000 Elm Street, 11th Floor, Manchester, NH. (jtp) Modified on 9/4/2015 to correct Debtor filer Re: Doc. 13 per court order entered 9/3/2015 (mjc). (Entered: 09/02/2015)
09/02/2015	28 (23 pgs)	Verified Statement re: Debtor's Matrix, List of Creditors Filed by Debtor Tempnology LLC (RE: related document(s) 9 Notice to File Missing Documents (Chapter 11)) (Sklar, Daniel) Modified on 9/2/2015 to add schedule(jtp). Modified on 9/4/2015 to correct Debtor filer per court order entered 9/3/2015 (mjc). (Entered: 09/02/2015)
09/02/2015	29 (41 pgs; 4 docs)	Application to Employ of Phoenix Capital Resources as Investment Banker Filed by Debtor Tempnology LLC(Attachments: # 1 Proposed Order Exhibit A # 2 Exhibit B - Engagement Letter of Phoenix Capital Resources

		# 3 Exhibit C - Declaration of Vincent Colistra) (Sklar, Daniel) Modified on 9/4/2015 to correct Debtor filer per court order entered 9/3/2015 (mjc). (Entered: 09/02/2015)
09/02/2015	30 (39 pgs; 6 docs)	Application to Employ of Nixon Peabody LLP as Counsel Nunc Pro Tunc to the Petition Date Filed by Debtor Tempnology LLC(Attachments: # 1 Exhibit A - Declaration of Daniel W. Sklar # 2 Exhibit 1 To Declaration of Daniel W. Sklar # 3 Exhibit 2 to Declaration of Daniel W. Sklar # 4 Exhibit 3 to Declaration of Daniel W. Sklar # 5 Proposed Order Exhibit B) (Sklar, Daniel) Modified on 9/4/2015 to correct Debtor filer per court order entered 9/3/2015 (mjc). (Entered: 09/02/2015)
09/02/2015	31 (17 pgs; 4 docs)	Application to Employ of Professionals Utilized in Ordinary Course of Business Filed by Debtor Tempnology LLC (Attachments: # 1 Proposed Order Exhibit A # 2 Exhibit 1 to Proposed Order # 3 Exhibit 2 to Proposed Order) (Sklar, Daniel) Modified on 9/4/2015 to correct Debtor filer per court order entered

		9/3/2015 (mjc). (Entered: 09/02/2015)
09/02/2015	32 (15 pgs; 3 docs)	****Administratively Corrected**** Omnibus Motion *to Reject Certain Executory Contracts Nunc Pro Tunc to the Petition Date* Filed by Debtor Tempnology LLC (Attachments: # 1 Proposed Order Exhibit A # 2Schedule A - Executory Contracts) (Sklar, Daniel) Modified on 9/3/2015 (jtp). Modified on 9/4/2015 to correct Debtor filer per court order entered 9/3/2015 (mjc). (Entered: 09/02/2015)
09/02/2015	33 (12 pgs; 2 docs)	Motion to Pay *Certain Charges Related to Goods Received by Debtor* Filed by Debtor Tempnology LLC (Attachments: # 1 Proposed Order) (Sklar, Daniel) Modified on 9/4/2015 to correct Debtor filer per court order entered 9/3/2015 (mjc). (Entered: 09/02/2015)
09/02/2015	34 (149 pgs; 10 docs)	Motion to Approve Procedures In Connection With Sale Of Substantially All Of Debtors Assets, (B) Approving Stalking Horse Protections, (C) Scheduling Related Auction And Hearing To Consider Approval Of Sale, (D)

Approving Procedures Related To Assumption And Assignment Of Certain Executory Contracts And Unexpired Leases, And (E) Approving Form And Manner Of Notice Thereof, And (II)(A) Authorizing Sale Of Substantially All Of Debtors Assets Pursuant To Successful Bidders Asset Purchase Agreement, Free And Clear Of Liens, Claims, Encumbrances, And Other Interests, And (B) Approving Assumption And Assignment Of Certain Executory Contracts And Unexpired Leases Related Thereto Filed by Debtor Tempnology LLC (Attachments: # 1 Proposed Order Exhibit A # 2 Exhibit 1 to Exhibit A - Bidding Procedures # 3 Exhibit 2 to Exhibit A - Stalking Horse Agreement # 4 Exhibit 3 to Exhibit A - Procedures Notice # 5 Exhibit 4 to Exhibit A - Notice of Assumption and Assignment # 6 Exhibit 1 to Exhibit 4 of Exhibit A - Assumed Contracts # 7 Proposed Order Exhibit B # 8 Asset Purchase Agreement # 9 Declaration of Vincent Colistra) (Sklar, Daniel) Modified on 9/4/2015 to correct Debtor filer per court order entered 9/3/2015 (mjc). (Entered: 09/02/2015)

09/02/2015	35 (15 pgs; 3 docs)	Omnibus Motion to Reject Executory Contracts Nunc Pro Tunc to the Petition date with Delco Illuminacio y Compementos, Trainers Choice, UK Sports Product, CAI Marketing Group, Hyman Intl, CIA Global Group Ltd, Yija International Trade Group, Cool Canuck, Mission Product Holdings, Ryan Drew, Justin Cupps, SKS Trade, LHR de Mexico, Perennial Sales Filed by Debtor Tempnology LLC (Attachments: # 1 Proposed Order # 2 Schedule A - Executory Contracts) (jtp) Modified on 9/4/2015 to correct Debtor filer per court order entered 9/3/2015 (mjc). (Entered: 09/03/2015)
09/03/2015	36	An Administrative Error was found with the filing of Omnibus Motion to Reject Certain Executory Contracts Nunc Pro Tunc to the Petition Date (Court Doc. No. 32). The incorrect filing event was used. The Clerks Office has re-entered the document onto the case docket using the correct filing event. (RE: related document(s)32 Motion filed by Debtor Tempnology LLC). (jtp) Modified on 9/4/2015 to correct Debtor filer per court order entered 9/3/2015

(mjc). (Entered: 09/03/2015)

09/03/2015	37 (5 pgs; 2 docs)	Ex Parte Motion for Christopher M. Desiderio to Appear pro hac vice *as Counsel to Debtor and Debtor in Posession* Filed by Debtor Tempnology LLC (Attachments: # 1 Affidavit Exhibit A) (Sklar, Daniel) Modified on 9/4/2015 to correct Debtor filer per court order entered 9/3/2015 (mjc). (Entered: 09/03/2015)
09/03/2015	38 (4 pgs; 2 docs)	Motion to Amend *The Debtor's Voluntary Petition* Filed by Debtor Tempnology LLC (RE: related document(s) 1 Voluntary Petition (Chapter 11) filed by Debtor Tempnology LLC, dba Coolcore) (Attachments: # 1 Proposed Order) (Sklar, Daniel) Modified on 9/4/2015 to correct Debtor filer per court order entered 9/3/2015 (mjc). (Entered: 09/03/2015)
09/03/2015	39 (1 pg)	Proposed Order Filed by Debtor Tempnology LLC (RE: related document(s) 37 Motion to Appear pro hac vice filed by Debtor Tempnology LLC) (Sklar, Daniel) Modified on 9/4/2015 to correct Debtor filer per court order entered 9/3/2015 (mjc). (Entered:

09/03/2015)

09/03/2015	40 (1 pg)	Order Granting Motion To Appear pro hac vice. Attorney Christopher M. Desiderio for Tempnology LLC added to case. (Related Doc 37) Signed on 9/3/2015. (jtp) Modified on 9/4/2015 to correct Debtor filer per court order entered 9/3/2015 (mjc). (Entered: 09/03/2015)
09/03/2015	41 (1 pg)	Order Directing Debtor Tempnology LLC to File Proposed Order on or before 9/10/15. Signed on 9/3/2015 (RE: related document(s) 7 Motion filed by Debtor Tempnology LLC) Proposed Order due on or before 9/10/2015. (jtp) Modified on 9/4/2015 to correct Debtor filer RE: Doc. 7 per court order entered 9/3/2015 (mjc). (Entered: 09/03/2015)
09/03/2015	42 (1 pg)	Order Directing Debtor Tempnology LLC to File Proposed Order on or before 9/10/15. Signed on 9/3/2015 (RE: related document(s) 10 Motion filed by Debtor Tempnology LLC) Proposed Order due on or before 9/10/2015. (jtp) Modified on 9/4/2015 to correct Debtor filer Re: Doc.10 per court order entered 9/3/2015

(mjc). (Entered: 09/03/2015)

09/03/2015	43 (1 pg)	Order Directing Debtor Tempnology LLC to File Proposed Order on or before 9/10/15. Signed on 9/3/2015 (RE: related document(s) 11 Motion filed by Debtor Tempnology LLC) Proposed Order due on or before 9/10/2015. (jtp) Modified on 9/4/2015 to correct Debtor filer Re: Doc. 11 per court order entered 9/3/2015 (mjc). (Entered: 09/03/2015)
09/03/2015	44 (1 pg)	Order Directing Debtor Tempnology LLC to File Proposed Order on or before 9/10/15. Signed on 9/3/2015 (RE: related document(s) 14 Motion for Adequate Protection filed by Debtor Tempnology LLC, Motion to Use Cash Collateral) Proposed Order due on or before 9/10/2015. (jtp) Modified on 9/4/2015 to correct Debtor filer Re: Doc. 14 per court order entered 9/3/2015 (mjc). (Entered: 09/03/2015)
09/03/2015	45 (3 pgs)	Order Granting Motion to Honor Returns and Exchanges (Related Doc # 13) Signed on 9/3/2015. (jtp) (Entered: 09/03/2015)
09/03/2015	46	Order Granting Motion For An

	(3 pgs)	Order Under Bankruptcy Code Sections 105(a), 363(b), 506, 1107(a) And 1108 Authorizing Payment Of Certain Prepetition Shipping, Warehousing, And Delivery Charges (Related Doc # 12) Signed on 9/3/2015. (jtp) (Entered: 09/03/2015)
09/03/2015	47 (1 pg)	Order Granting Motion To Amend The Debtor's Voluntary Petition. The Voluntary Petition will be amended by removing "dba Coolcore" from the Debtors Name. (Related Doc # 38) Signed on 9/3/2015. (jtp) (Entered: 09/03/2015)
09/03/2015	48 (4 pgs)	BNC Certificate of Notice. (RE: related document(s) 8 Order Setting Last Day To File Proofs of Claim). No. of Notices: 135. Notice Date 09/03/2015. (Admin.) (Entered: 09/04/2015)
09/03/2015	49 (2 pgs)	BNC Certificate of Notice. (RE: related document(s) 9 Notice to File Missing Documents (Chapter 11)). No. of Notices: 1. Notice Date 09/03/2015. (Admin.) (Entered: 09/04/2015)
09/04/2015	50 (6 pgs)	Proposed Order *Interim* Filed by Debtor Tempnology LLC (RE:

		related document(s) 7 Motion filed by Debtor Tempnology LLC) (Sklar, Daniel) Modified on 9/4/2015 to correct Debtor filer Re: Doc. 7 per court order entered 9/3/2015 (mjc). (Entered: 09/04/2015)
09/04/2015	51 (4 pgs)	Proposed Order *Interim* Filed by Debtor Tempnology LLC(RE: related document(s) 10 Motion filed by Debtor Tempnology LLC) (Sklar, Daniel) Modified on 9/4/2015 to correct Debtor filer Re: Doc. 10 per court order entered 9/3/2015 (mjc). (Entered: 09/04/2015)
09/04/2015	52 (6 pgs; 2 docs)	Proposed Order *Interim* Filed by Debtor Tempnology LLC(RE: related document(s) 11 Motion filed by Debtor Tempnology LLC) (Attachments: # 1 Exhibit 1 - Utility Services List) (Sklar, Daniel) Modified on 9/4/2015 to correct Debtor filer Re: Doc. 11 per court order entered 9/3/2015 (mjc). (Entered: 09/04/2015)
09/04/2015	53 (31 pgs)	Proposed Order *Interim* Filed by Debtor Tempnology LLC (RE: related document(s) 14 Motion for Adequate Protection filed by Debtor Tempnology LLC, Motion

		to Use Cash Collateral) (Sklar, Daniel) (Entered: 09/04/2015)
09/04/2015	54 (6 pgs)	Interim Order Granting Motion of Debtor Pursuant to Bankruptcy Code Sections 105(a), 345(b), 363(c)(1), 364(a), 364(b), and 503(b)(1) and Bankruptcy Rules 6003 and 6004, (A) Authorizing Debtor to Use Existing Cash Management System, (B) Authorizing and Directing Banks and Financial Institutions to Honor and Process Checks and Transfers, and (C) Authorizing Debtor to Use Existing Bank Accounts and Existing Businiess Forms (Related Doc # 7) Signed on 9/4/2015. (gll) (Entered: 09/04/2015)
09/04/2015	55 (4 pgs)	Order Granting Motion OF DEBTOR PURSUANT TO BANKRUPTCY CODE SECTIONS 105(a), 363(b), 503(b), 507(a)(4), AND 507(a)(8) AND BANKRUPTCY RULES 6003 AND 6004, FOR ENTRY OF INTERIM AND FINAL ORDERS (I) AUTHORIZING DEBTOR TO (A) PAY CERTAIN EMPLOYEE COMPENSATION AND BENEFITS, AND (B)

		MAINTAIN SUCH EMPLOYEE BENEFITS PROGRAMS; AND (II) AUTHORIZING AND DIRECTING BANKS AND FINANCIAL INSTITUTIONS TO HONOR AND PROCESS CHECKS AND TRANSFERS RELATED TO SUCH OBLIGATIONS(Related Doc # 10) Signed on 9/4/2015. (gll) (Entered: 09/04/2015)
09/04/2015	56 (6 pgs)	Order Granting Motion OF DEBTOR PURSUANT TO BANKRUPTCY CODE SECTIONS 105(a) AND 366 (A) APPROVING DEBTORS PROPOSED ADEQUATE ASSURANCE OF PAYMENT TO UTILITY COMPANIES, AND(B) PROHIBITING UTILITY COMPANIES FROM ALTERING, REFUSING OR DISCONTINUING SERVICE (Related Doc # 11) Signed on 9/4/2015. (gll) (Entered: 09/04/2015)
09/04/2015	57 (31 pgs)	Order granting INTERIM Signed on 9/4/2015 (RE: related document(s) 14 Motion for Adequate Protection filed by Debtor Tempnology LLC, Motion to Use

		Cash Collateral and Authorizing Debtor to Obtain Post-Petition Financing (dcs) (Entered: 09/04/2015)
09/04/2015	58	Hearing Set On FINAL (RE: related document(s)14 Motion for Adequate Protection filed by Debtor Tempnology LLC, Motion to Use Cash Collateral and Authorizing Debtor to Obtain Post-Petition Financing). Hearing scheduled for 9/18/2015 at 10:00 AM at Courtroom 1, 1000 Elm Street, 11th Floor, Manchester, NH. (dcs) (Entered: 09/04/2015)
09/04/2015	59 (5 pgs; 2 docs)	Certificate of Service Filed by Debtor Tempnology LLC (RE: related document(s) 14 Motion for Adequate Protection filed by Debtor Tempnology LLC, Motion to Use Cash Collateral, 57 Order) (Attachments: # 1Notice of Hearing) (Sklar, Daniel) (Entered: 09/04/2015)
09/04/2015	60 (6 pgs)	Notice of Hearing Filed by Debtor Tempnology LLC (RE: related document(s) 7 Motion filed by Debtor Tempnology LLC, 10 Motion filed by Debtor Tempnology LLC, 11 Motion filed by Debtor Tempnology

		LLC, 33 Motion to Pay filed by Debtor Tempnology LLC, 34 Motion to Approve filed by Debtor Tempnology LLC, 35 Motion to Assume/Reject filed by Debtor Tempnology LLC) Hearing scheduled for 9/18/2015 at 10:00 AM at Courtroom 1, 1000 Elm Street, 11th Floor, Manchester, NH. (Sklar, Daniel) (Entered: 09/04/2015)
09/04/2015	61 (5 pgs)	BNC Certificate of Notice - Meeting of Creditors. (RE: related document(s) 18 Meeting of Creditors (Chapter 11)). No. of Notices: 137. Notice Date 09/04/2015. (Admin.) (Entered: 09/05/2015)
09/05/2015	62 (2 pgs)	BNC Certificate of Notice - PDF Document. (RE: related document(s) 47 Order on Motion to Amend). No. of Notices: 1. Notice Date 09/05/2015. (Admin.) (Entered: 09/06/2015)
09/05/2015	63 (2 pgs)	BNC Certificate of Notice - PDF Document. (RE: related document(s) 40 Order on Motion to Appear pro hac vice). No. of Notices: 2. Notice Date 09/05/2015. (Admin.) (Entered: 09/06/2015)

09/05/2015	64 (2 pgs)	BNC Certificate of Notice - PDF Document. (RE: related document(s) 41 Order Directing). No. of Notices: 1. Notice Date 09/05/2015. (Admin.) (Entered: 09/06/2015)
09/05/2015	65 (2 pgs)	BNC Certificate of Notice - PDF Document. (RE: related document(s) 42 Order Directing). No. of Notices: 1. Notice Date 09/05/2015. (Admin.) (Entered: 09/06/2015)
09/05/2015	66 (2 pgs)	BNC Certificate of Notice - PDF Document. (RE: related document(s) 43 Order Directing). No. of Notices: 1. Notice Date 09/05/2015. (Admin.) (Entered: 09/06/2015)
09/05/2015	67 (2 pgs)	BNC Certificate of Notice - PDF Document. (RE: related document(s) 44 Order Directing). No. of Notices: 1. Notice Date 09/05/2015. (Admin.) (Entered: 09/06/2015)
09/05/2015	68 (4 pgs)	BNC Certificate of Notice - PDF Document. (RE: related document(s) 45 Order). No. of Notices: 1. Notice Date 09/05/2015. (Admin.) (Entered: 09/06/2015)

09/05/2015	69 (4 pgs)	BNC Certificate of Notice - PDF Document. (RE: related document(s) 46 Order). No. of Notices: 1. Notice Date 09/05/2015. (Admin.) (Entered: 09/06/2015)
09/06/2015	70 (7 pgs)	BNC Certificate of Notice - PDF Document. (RE: related document(s) 54 Order). No. of Notices: 2. Notice Date 09/06/2015. (Admin.) (Entered: 09/07/2015)
09/06/2015	71 (5 pgs)	BNC Certificate of Notice - PDF Document. (RE: related document(s) 55 Order). No. of Notices: 2. Notice Date 09/06/2015. (Admin.) (Entered: 09/07/2015)
09/06/2015	72 (7 pgs)	BNC Certificate of Notice - PDF Document. (RE: related document(s) 56 Order). No. of Notices: 2. Notice Date 09/06/2015. (Admin.) (Entered: 09/07/2015)
09/06/2015	73 (32 pgs)	BNC Certificate of Notice - PDF Document. (RE: related document(s) 57 Order). No. of Notices: 1. Notice Date 09/06/2015. (Admin.) (Entered: 09/07/2015)
09/08/2015	74	Hearing Set On (RE: related document(s)7 Motion filed by Debtor Tempnology LLC). Hearing scheduled for 9/18/2015 at 10:00

		AM at Courtroom 1, 1000 Elm Street, 11th Floor, Manchester, NH. (jtp) (Entered: 09/08/2015)
09/08/2015	75	Hearing Set On (RE: related document(s)10 Motion filed by Debtor Tempnology LLC). Hearing scheduled for 9/18/2015 at 10:00 AM at Courtroom 1, 1000 Elm Street, 11th Floor, Manchester, NH. (jtp) (Entered: 09/08/2015)
09/08/2015	76	Hearing Set On (RE: related document(s)11 Motion filed by Debtor Tempnology LLC). Hearing scheduled for 9/18/2015 at 10:00 AM at Courtroom 1, 1000 Elm Street, 11th Floor, Manchester, NH. (jtp) (Entered: 09/08/2015)
09/08/2015	77	Hearing Set On (RE: related document(s)33 Motion to Pay filed by Debtor Tempnology LLC). Hearing scheduled for 9/18/2015 at 10:00 AM at Courtroom 1, 1000 Elm Street, 11th Floor, Manchester, NH. (jtp) (Entered: 09/08/2015)
09/08/2015	78	Hearing Set On (RE: related document(s)34 Motion to Approve filed by Debtor Tempnology LLC). Hearing scheduled for 9/18/2015 at 10:00 AM at Court-

		room 1, 1000 Elm Street, 11th Floor, Manchester, NH. (jtp) (Entered: 09/08/2015)
09/08/2015	79	Hearing Set On (RE: related document(s)35 Motion to Assume/Reject filed by Debtor Tempnology LLC). Hearing scheduled for 9/18/2015 at 10:00 AM at Courtroom 1, 1000 Elm Street, 11th Floor, Manchester, NH. (jtp) (Entered: 09/08/2015)
09/08/2015	80 (2 pgs)	Notice of Appearance and Request for Notice by Michael A. Klass Filed by Creditor Mission Product Holdings, Inc. (Klass, Michael) Modified on 9/8/2015 to correct party type (jtp). (Entered: 09/08/2015)
09/08/2015	82	Order Striking Certificate of Service (Court Doc. No. 81). The document was filed into the incorrect case. Signed on 9/8/2015 /s/ Judge Bruce A. Harwood (RE: related document(s) 81 Certificate of Service filed by Debtor Tempnology LLC) (jtp) (Entered: 09/08/2015)
09/08/2015	83 (3 pgs)	Certificate of Service Filed by Debtor Tempnology LLC (RE: related docu-

		ment(s) 29 Application to Employ filed by Debtor Tempnology LLC, 30 Application to Employ filed by Debtor Tempnology LLC, 31 Application to Employ filed by Debtor Tempnology LLC, 33 Motion to Pay filed by Debtor Tempnology LLC, 34 Motion to Approve filed by Debtor Tempnology LLC) (Sklar, Daniel) (Entered: 09/08/2015)
09/08/2015	84 (3 pgs)	Certificate of Service Filed by Debtor Tempnology LLC (RE: related document(s) 35 Motion to Assume/Reject filed by Debtor Tempnology LLC) (Sklar, Daniel) (Entered: 09/08/2015)
09/08/2015	85 (6 pgs; 3 docs)	Motion for Robert J. Keach to Appear pro hac vice Filed by Creditor Mission Product Holdings, Inc. (Attachments: # 1 Exhibit A # 2 Proposed Order) (Klass, Michael) (Entered: 09/08/2015)
09/08/2015	86 (6 pgs; 3 docs)	Motion for Roma N. Desai to Appear pro hac vice Filed by Creditor Mission Product Holdings, Inc. (Attachments: # 1 Exhibit A # 2 Proposed Order) (Klass, Michael) (Entered: 09/08/2015)

09/08/2015	87 (6 pgs; 3 docs)	Motion for Michael A. Siedband to Appear pro hac vice Filed by Creditor Mission Product Holdings, Inc. (Attachments: # 1 Exhibit A # 2 Proposed Order) (Klass, Michael) (Entered: 09/08/2015)
09/08/2015	88 (6 pgs; 3 docs)	Motion for Jessica A. Lewis to Appear pro hac vice Filed by Creditor Mission Product Holdings, Inc. (Attachments: # 1 Exhibit A # 2 Proposed Order) (Klass, Michael) (Entered: 09/08/2015)
09/08/2015	89 (55 pgs)	Debtor Organizational Documents Filed by Debtor Tempnology LLC (RE: related document(s) 9 Notice to File Missing Documents (Chapter 11)) (Sklar, Daniel) (Entered: 09/08/2015)
09/08/2015	90 (6 pgs; 3 docs)	Motion for Attorney Lee Harrington to Appear pro hac vice Filed by Debtor Tempnology LLC (Attachments: # 1 Affidavit Exhibit A # 2 Proposed Order) (Sklar, Daniel) (Entered: 09/08/2015)
09/08/2015	91 (1 pg)	Order Granting Motion To Appear pro hac vice. Attorney Robert J. Keach for Mission Product

		Holdings, Inc. added to case. (Related Doc # 85) Signed on 9/8/2015. (jtp) (Entered: 09/09/2015)
09/08/2015	92 (1 pg)	Order Granting Motion To Appear pro hac vice. Attorney Roma N. Desai for Mission Product Holdings, Inc. added to case. (Related Doc # 86) Signed on 9/8/2015. (jtp) (Entered: 09/09/2015)
09/08/2015	93 (1 pg)	Order Granting Motion To Appear pro hac vice. Attorney Michael Siedband for Mission Product Holdings, Inc. added to case. (Related Doc # 87) Signed on 9/8/2015. (jtp) (Entered: 09/09/2015)
09/08/2015	94 (1 pg)	Order Granting Motion To Appear pro hac vice. Attorney Jessica A. Lewis for Mission Product Holdings, Inc. added to case. (Related Doc # 88) Signed on 9/8/2015. (jtp) (Entered: 09/09/2015)
09/09/2015	95 (1 pg)	Order Granting Motion To Appear pro hac vice. Attorney Lee Harrington for Tempnology LLC added to case. (Related Doc # 90) Signed on 9/9/2015. (jtp) (En-

tered: 09/09/2015)

09/10/2015	96 (1 pg)	Courts Certificate of Service (RE: related document(s) 93 Order on Motion to Appear pro hac vice) (jtp) (Entered: 09/10/2015)
09/11/2015	97 (2 pgs)	Notice of Appearance and Request for Notice by James F. Raymond Filed by Creditor Cool Canuck Corp. (Raymond, James) (Entered: 09/11/2015)
09/11/2015	98 (2 pgs)	Notice of Appearance and Request for Notice by Steven J. Venezia Filed by Creditor Cool Canuck Corp. (Venezia, Steven) (Entered: 09/11/2015)
09/11/2015	99 (64 pgs; 3 docs)	Objection Filed by Creditor Mission Product Holdings, Inc. (RE: related document(s) 14 Motion for Adequate Protection filed by Debtor Tempnology LLC, Motion to Use Cash Collateral, 34 Motion to Approve filed by Debtor Tempnology LLC, 35 Motion to Assume/Reject filed by Debtor Tempnology LLC) (Attachments: # 1 Exhibit A - Co-Marketing and Distribution Agreement # 2 Exhibit B - Arbitration Decision) (Keach, Robert) (Entered:

09/11/2015)

09/11/2015	100 (3 pgs)	Certificate of Service Filed by Creditor Mission Product Holdings, Inc. (RE: related document(s) 99Objection filed by Creditor Mission Product Holdings, Inc.) (Keach, Robert) (Entered: 09/11/2015)
09/11/2015	101 (2 pgs)	BNC Certificate of Notice - PDF Document. (RE: related document(s) 91 Order on Motion to Appear pro hac vice). No. of Notices: 2. Notice Date 09/11/2015. (Admin.) (Entered: 09/12/2015)
09/11/2015	102 (2 pgs)	BNC Certificate of Notice - PDF Document. (RE: related document(s) 92 Order on Motion to Appear pro hac vice). No. of Notices: 2. Notice Date 09/11/2015. (Admin.) (Entered: 09/12/2015)
09/11/2015	103 (2 pgs)	BNC Certificate of Notice - PDF Document. (RE: related document(s) 93 Order on Motion to Appear pro hac vice). No. of Notices: 2. Notice Date 09/11/2015. (Admin.) (Entered: 09/12/2015)
09/11/2015	104 (2 pgs)	BNC Certificate of Notice - PDF Document. (RE: related document(s) 94 Order on Motion to

		Appear pro hac vice). No. of Notices: 3. Notice Date 09/11/2015. (Admin.) (Entered: 09/12/2015)
09/11/2015	105 (2 pgs)	BNC Certificate of Notice - PDF Document. (RE: related document(s) 95 Order on Motion to Appear pro hac vice). No. of Notices: 3. Notice Date 09/11/2015. (Admin.) (Entered: 09/12/2015)
09/14/2015	106 (1 pg)	Notice of Dismissal (Contingent). This case shall be dismissed after October 5, 2015 For Failure to Submit Declarations Regarding Electronic Filing - LBF 5005-4 re: List of 20 Largest Unsecured Creditors Doc. No. 6, Verified Statement re: Debtor's Matrix, List of Creditors Doc. No. 28 unless the missing documents/fees are filed/submitted and/or paid. (RE: related document(s)6 20 Largest Unsecured Creditors filed by Debtor Tempnology LLC, 28 Verified Statement re: Debtor's Matrix filed by Debtor Tempnology LLC). Case to be Dismissed Unless Conditions Met on or before 10/5/2015. (gll) (Entered: 09/14/2015)
09/14/2015	107 (17 pgs;	Motion to Convert Chapter Case to Chapter 7. Receipt Number

	4 docs)	UST, Fee Amount $ 15., Motion to Appoint Trustee, Motion to Appoint Examiner Filed by U.S. Trustee Office of the U.S. Trustee (Attachments: # 1Proposed Order to Convert to Chapter 7 # 2 Proposed Order Authorizing Appointment of Chapter 11 Trustee # 3 Proposed Order Directing Appointment of Examiner) (Dirsa, Ann) (Entered: 09/14/2015)
09/14/2015	108 (3 pgs; 2 docs)	Motion to Expedite Hearing Filed by U.S. Trustee Office of the U.S. Trustee (RE: related document(s) 107Motion to Convert to Chapter 7 filed by U.S. Trustee Office of the U.S. Trustee, Motion to Appoint Trustee, Motion to Appoint Examiner) (Attachments: # 1 Proposed Order) (Dirsa, Ann) (Entered: 09/14/2015)
09/14/2015	109 (1 pg)	Order Granting Motion Expedite Hearing (related document(s) 107 Motion to Convert to Chapter 7 filed by U.S. Trustee Office of the U.S. Trustee, Motion to Appoint Trustee, Motion to Appoint Examiner) Hearing scheduled for 9/18/2015 at 10:00 AM at Courtroom 1, 1000 Elm Street, 11th Floor, Manchester,

		NH. Signed on 9/14/2015. (hk) (Entered: 09/14/2015)
09/14/2015	110 (1 pg)	Hearing Scheduled (RE: related document(s)107 Motion to Convert to Chapter 7 filed by U.S. Trustee Office of the U.S. Trustee, Motion to Appoint Trustee, Motion to Appoint Examiner). Hearing scheduled for 9/18/2015 at 10:00 AM at Courtroom 1, 1000 Elm Street, 11th Floor, Manchester, NH. (hk) (Entered: 09/14/2015)
09/15/2015	111 (31 pgs; 3 docs)	Motion to Appoint Trustee , Motion to Appoint Examiner Filed by Creditor Mission Product Holdings, Inc. (Attachments: # 1 Exhibit A - Arbitration Decision # 2 Proposed Order) (Keach, Robert) (Entered: 09/15/2015)
09/15/2015	112 (5 pgs; 2 docs)	Motion to Expedite Hearing , Motion to Shorten Notice Filed by Creditor Mission Product Holdings, Inc. (RE: related document(s) 111 Motion to Appoint Trustee filed by Creditor Mission Product Holdings, Inc., Motion to Appoint Examiner) (Attachments: # 1 Proposed Order) (Keach, Robert) (Entered: 09/15/2015)

09/15/2015	113 (1 pg)	Order Granting Motion Expedite Hearing (related document(s) 111 Motion to Appoint Trustee filed by Creditor Mission Product Holdings, Inc., Motion to Appoint Examiner), Granting Motion To Shorten Notice (Related Doc # 112) Hearing scheduled for 9/18/2015 at 10:00 AM at Courtroom 1, 1000 Elm Street, 11th Floor, Manchester, NH. Signed on 9/15/2015. (hk) (Entered: 09/15/2015)
09/15/2015	114 (2 pgs)	Notice of Hearing Filed by Creditor Mission Product Holdings, Inc. (RE: related document(s) 111 Motion to Appoint Trustee filed by Creditor Mission Product Holdings, Inc., Motion to Appoint Examiner) Hearing scheduled for 9/18/2015 at 10:00 AM at Courtroom 1, 1000 Elm Street, 11th Floor, Manchester, NH. (Keach, Robert) (Entered: 09/15/2015)
09/15/2015	115 (4 pgs)	Certificate of Service Filed by Creditor Mission Product Holdings, Inc. (RE: related document(s) 111 Motion to Appoint Trustee filed by Creditor Mission Product Holdings, Inc., Motion to Appoint Examiner, 112Motion to

		Expedite Hearing filed by Creditor Mission Product Holdings, Inc., Motion to Shorten Notice, 114Notice of Hearing filed by Creditor Mission Product Holdings, Inc.) (Keach, Robert) (Entered: 09/15/2015)
09/16/2015	116 (8 pgs; 4 docs)	Report of Bankruptcy Rule 2015.3 *Periodic Report Regarding Value, Operations and Profitability of Entities in Which the Estate of Tempnology, LLC Holds a Substantial or Controlling Interest* Filed by Debtor Tempnology LLC (Attachments: # 1 Exhibit A - Valuation Estimate for Granite Textiles Co. Ltd # 2 Exhibit B - Financial Statements # 3 Exhibit C - Description of Operations for Granite Textiles Co., Ltd) (Sklar, Daniel) (Entered: 09/16/2015)
09/16/2015	117 (10 pgs)	Objection Filed by U.S. Trustee Office of the U.S. Trustee (RE: related document(s) 14 Motion for Adequate Protection filed by Debtor Tempnology LLC, Motion to Use Cash Collateral) (Dirsa, Ann) (Entered: 09/16/2015)
09/16/2015	118 (4 pgs)	Objection Filed by U.S. Trustee Office of the U.S. Trustee (RE: related document(s) 34 Motion to

		Approve filed by Debtor Tempnology LLC) (Dirsa, Ann) (Entered: 09/16/2015)
09/16/2015	119 (1 pg)	Notice of Dismissal (Contingent). This case shall be dismissed after October 7, 2015 For Failure to File Schedules unless the missing documents/fees are filed/submitted and/or paid. Missing documents: Equity Security Holder List, Statement of Parent/Public Companies (RE: related document(s)9 Notice to File Missing Documents (Chapter 11)). Case to be Dismissed Unless Conditions Met on or before 10/7/2015. (hk) (Entered: 09/16/2015)
09/16/2015	120 (4 pgs)	BNC Certificate of Notice - Hearing. (RE: related document(s) 110 Hearing Scheduled). No. of Notices: 136. Notice Date 09/16/2015. (Admin.) (Entered: 09/17/2015)
09/16/2015	121 (2 pgs)	BNC Certificate of Notice. (RE: related document(s) 106 Notice of Dismissal (Contingent)). No. of Notices: 1. Notice Date 09/16/2015. (Admin.) (Entered: 09/17/2015)

09/17/2015	122 (14 pgs)	Reply *to Mission Product Holdings, Inc.'s (I) Objection to Debtor's (A) Rejection Motion; (B) Sale Motion; and (C) DIP Financing Motion; and (II) Election Pursuant to 11 U.S.C. Section 365(n)(1)(B)* Filed by Debtor Tempnology LLC (RE: related document(s) 99 Objection filed by Creditor Mission Product Holdings, Inc.) (Sklar, Daniel) (Entered: 09/17/2015)
09/17/2015	123 (14 pgs)	Objection *to (A) Motion of United States Trustee for an Order Converting the Debtor's Case to Chapter 7 or in the Alternative Authorizing the Appointment of a Chapter 11 Trustee or Examiner and (B) Mission Product Holdings, Inc.'s Motion for an Order Directing the Appointment of a Chapter 11 Trustee or Examiner Pursuant to 11 U.S.C. Section 1104 and Fed. R. Bankr. P. 2007.1* Filed by Debtor Tempnology LLC (RE: related document(s) 107 Motion to Convert to Chapter 7 filed by U.S. Trustee Office of the U.S. Trustee, Motion to Appoint Trustee, Motion to Appoint Examiner, 111 Motion to Appoint Trustee filed by Creditor Mission Product Holdings, Inc.,

		Motion to Appoint Examiner) (Sklar, Daniel) (Entered: 09/17/2015)
09/17/2015	124 (4 pgs)	Notice of Hearing Filed by Debtor Tempnology LLC (RE: related document(s) 29 Application to Employ filed by Debtor Tempnology LLC, 30 Application to Employ filed by Debtor Tempnology LLC, 31 Application to Employ filed by Debtor Tempnology LLC) Hearing scheduled for 10/8/2015 at 01:30 PM at Courtroom 1, 1000 Elm Street, 11th Floor, Manchester, NH. (Sklar, Daniel) (Entered: 09/17/2015)
09/17/2015	125 (65 pgs; 2 docs)	Limited Response Filed by Creditor Schleicher & Stebbins Hotels, L.L.C. (RE: related document(s) 99Objection filed by Creditor Mission Product Holdings, Inc., 117 Objection filed by U.S. Trustee Office of the U.S. Trustee, 118 Objection filed by U.S. Trustee Office of the U.S. Trustee) (Attachments: # 1 Exhibit) (Candon, Christopher) (Entered: 09/17/2015)
09/17/2015	126 (3 pgs)	Certificate of Service Filed by Creditor Schleicher & Stebbins

		Hotels, L.L.C. (RE: related document(s) 125Response filed by Creditor Schleicher & Stebbins Hotels, L.L.C.) (Candon, Christopher) (Entered: 09/17/2015)
09/17/2015	127 (2 pgs)	BNC Certificate of Notice - PDF Document. (RE: related document(s) 113 Order on Motion to Expedite Hearing). No. of Notices: 1. Notice Date 09/17/2015. (Admin.) (Entered: 09/18/2015)
09/18/2015	128 (1 pg)	Order Directing Debtor to File Revised Proposed Order on or before 9/25/15. Signed on 9/18/2015 (RE: related document(s) 7 Motion filed by Debtor Tempnology LLC) Revised Proposed Order due on or before 9/25/2015. (dcs) (Entered: 09/18/2015)
09/18/2015	129 (1 pg)	Order Directing Debtor/Movant to File Revised Proposed Order on or before 9/25/15. Signed on 9/18/2015 (RE: related document(s) 11 Motion OF DEBTOR PURSUANT TO BANKRUPTCY CODE SECTIONS 105(a) AND 366 (A) APPROVING DEBTORS PROPOSED ADEQUATE ASSURANCE OF PAYMENT

		TO UTILITY COMPANIES, AND(B) PROHIBITING UTILITY COMPANIES FROM ALTERING, REFUSING OR DISCONTINUING SERVICE filed by Debtor Tempnology LLC) Revised Proposed Order due on or before 9/25/2015. (dcs) (Entered: 09/18/2015)
09/18/2015	130 (1 pg)	Order Directing Debtor/Movant to File Proposed Order on or before 9/25/15. Signed on 9/18/2015 (RE: related document(s) 14 Motion for Adequate Protection and Scheduling of a Final Hearing, Motion to Use Cash Collateral and Authorizing Debtor to Obtain Post-Petition Financing filed by Debtor Tempnology LLC, Motion to Use Cash Collateral) Proposed Order due on or before 9/25/2015. (dcs) (Entered: 09/18/2015)
09/18/2015	131 (1 pg)	Order to Continue/Schedule Hearing Signed on 9/18/2015 (RE: related document(s) 34 Motion to Approve Procedures In Connection With Sale Of Substantially All Of Debtors Assets, (B) Approving Stalking Horse Protections, (C) Scheduling Related Auction And Hearing To Consid-

		er Approval Of Sale, (D) Approving Procedures Related To Assumption And Assignment Of Certain Executory Contracts And Unexpired Leases, And (E) Approving Form And Manner Of Notice Thereof, And (II)(A) Authorizing Sale Of Substantially All Of Debtors Assets Pursuant To Successful Bidders Asset Purchase Agreement, Free And Clear Of Liens, Claims, Encumbrances, And Other Interests, And (B) Approving Assumption And Assignment Of Certain Executory Contracts And Unexpired Leases Related Thereto filed by Debtor Tempnology LLC) Hearing scheduled for 10/2/2015 at 09:00 AM at Courtroom 1, 1000 Elm Street, 11th Floor, Manchester, NH. (dcs) (Entered: 09/18/2015)
09/18/2015	132 (1 pg)	Order Directing Debtor to File Proposed Order on or before 9/25/15. Signed on 9/18/2015 (RE: related document(s) 35 Motion to Assume/Reject Nunc Pro Tunc to the Petition date with Delco Illuminacio y Compementos, Trainers Choice, UK Sports Product, CAI Marketing Group, Hyman Intl, CIA Global Group Ltd, Yija

		International Trade Group, Cool Canuck, Mission Product Holdings, Ryan Drew, Justin Cupps, SKS Trade, LHR de Mexico, Perennial Sales filed by Debtor Tempnology LLC) Proposed Order due on or before 9/25/2015. (dcs) (Entered: 09/18/2015)
09/18/2015	133 (1 pg)	Order Directing UST to File Revised Proposed Order appointing examiner on or before 9/25/15. Signed on 9/18/2015 (RE: related document(s) 107 Motion to Convert to Chapter 7 filed by U.S. Trustee, Motion to Appoint Trustee, Motion to Appoint Examiner) Proposed Order due on or before 9/25/2015. (dcs) (Entered: 09/18/2015)
09/18/2015	134 (1 pg)	Order Denying as Moot Motion To Appoint Trustee (Related Doc # 111), Denying as Moot Motion To Appoint Examiner (Related Doc # 111) Signed on 9/18/2015. (dcs) (Entered: 09/18/2015)
09/18/2015	135 (4 pgs)	FINAL Order Granting Motion OF DEBTOR PURSUANT TO BANKRUPTCY CODE SECTIONS 105(a), 363(b), 503(b), 507(a)(4), AND 507(a)(8) AND BANKRUPTCY RULES 6003

		AND 6004, FOR ENTRY OF INTERIM AND FINAL ORDERS (I) AUTHORIZING DEBTOR TO (A) PAY CERTAIN EMPLOYEE COMPENSATION AND BENEFITS, AND (B) MAINTAIN SUCH EMPLOYEE BENEFITS PROGRAMS; AND (II) AUTHORIZING AND DIRECTING BANKS AND FINANCIAL INSTITUTIONS TO HONOR AND PROCESS CHECKS AND TRANSFERS RELATED TO SUCH OBLIGATIONS (Related Doc # 10) Signed on 9/18/2015. (dcs) (Entered: 09/18/2015)
09/18/2015	136 (3 pgs)	Order Granting Motion To Pay Certain Charges Related to Goods Received by Debtor (Related Doc # 33) Signed on 9/18/2015. (dcs) (Entered: 09/18/2015)
09/18/2015	137 (3 pgs)	Proposed Order *(Amended)* Filed by U.S. Trustee Office of the U.S. Trustee (RE: related document(s) 107Motion to Convert to Chapter 7 filed by U.S. Trustee Office of the U.S. Trustee, Motion to Appoint Trustee, Motion to

		Appoint Examiner, 133 Order Directing) (Dirsa, Ann) (Entered: 09/18/2015)
09/18/2015	138 (3 pgs)	Order Granting Motion To Appoint Examiner (Related Doc # 107) Signed on 9/18/2015. (dcs) (Entered: 09/18/2015)
09/18/2015	139 (13 pgs; 4 docs)	Exhibit *A - Amended - Declaration of Daniel W. Sklar in Support of Debtor's Application, Pursuant to Bankruptcy Code Sections 327(a), 328(a), and 329(a) and Bankruptcy Rules 2014(a) and 2016(b), For Entry of an Order Authorizing the Retention and Employment of Nixon Peabody LLP as Counsel, Nunc Pro Tunc to the Petition Date* Filed by Debtor Tempnology LLC (RE: related document(s) 30 Application to Employ filed by Debtor Tempnology LLC) (Attachments: # 1 Exhibit 1 - List of Interested Parties # 2 Exhibit 2 - Additional Parties in Interest or Their Affiliates Whom Nixon Peabody Represents or Has Represented in the Past in Matters Unrelated to the Debtor # 3 Exhibit 3 - Parties in Interest or Their Affiliates Whom Nixon Peabody Repre-

		sents or Has Represented in the Past in Matters Related to the Debtor) (Sklar, Daniel) (Entered: 09/18/2015)
09/18/2015	140 (2 pgs)	BNC Certificate of Notice. (RE: related document(s) 119 Notice of Dismissal (Contingent)). No. of Notices: 1. Notice Date 09/18/2015. (Admin.) (Entered: 09/19/2015)
09/18/2015	151 (3 pgs)	Order Denying Motion to Convert Case to Chapter 7 (Related Doc # 107), Denying Motion To Appoint Trustee (Related Doc # 107) Signed on 9/18/2015. (dcs) (Entered: 09/21/2015)
09/20/2015	141 (6 pgs)	BNC Certificate of Notice - PDF Document. (RE: related document(s) 136 Order on Motion to Pay). No. of Notices: 137. Notice Date 09/20/2015. (Admin.) (Entered: 09/21/2015)
09/20/2015	142 (6 pgs)	BNC Certificate of Notice - PDF Document. (RE: related document(s) 138 Order on Motion to Appoint Examiner). No. of Notices: 137. Notice Date 09/20/2015. (Admin.) (Entered: 09/21/2015)
09/20/2015	143	BNC Certificate of Notice - PDF

	(4 pgs)	Document. (RE: related document(s) 134 Order on Motion to Appoint Trustee). No. of Notices: 137. Notice Date 09/20/2015. (Admin.) (Entered: 09/21/2015)
09/20/2015	144 (2 pgs)	BNC Certificate of Notice - PDF Document. (RE: related document(s) 131 Order to Continue/Schedule Hearing). No. of Notices: 2. Notice Date 09/20/2015. (Admin.) (Entered: 09/21/2015)
09/20/2015	145 (2 pgs)	BNC Certificate of Notice - PDF Document. (RE: related document(s) 128 Order Directing). No. of Notices: 2. Notice Date 09/20/2015. (Admin.) (Entered: 09/21/2015)
09/20/2015	146 (2 pgs)	BNC Certificate of Notice - PDF Document. (RE: related document(s) 129 Order Directing). No. of Notices: 2. Notice Date 09/20/2015. (Admin.) (Entered: 09/21/2015)
09/20/2015	147 (2 pgs)	BNC Certificate of Notice - PDF Document. (RE: related document(s) 130 Order Directing). No. of Notices: 2. Notice Date 09/20/2015. (Admin.) (Entered: 09/21/2015)

09/20/2015	148 (2 pgs)	BNC Certificate of Notice - PDF Document. (RE: related document(s) 132 Order Directing). No. of Notices: 2. Notice Date 09/20/2015. (Admin.) (Entered: 09/21/2015)
09/20/2015	149 (2 pgs)	BNC Certificate of Notice - PDF Document. (RE: related document(s) 133 Order Directing). No. of Notices: 2. Notice Date 09/20/2015. (Admin.) (Entered: 09/21/2015)
09/20/2015	150 (5 pgs)	BNC Certificate of Notice - PDF Document. (RE: related document(s) 135 Order). No. of Notices: 2. Notice Date 09/20/2015. (Admin.) (Entered: 09/21/2015)
09/21/2015	152 (3 pgs)	Certificate of Service Filed by Debtor Tempnology LLC (RE: related document(s) 139 Exhibit filed by Debtor Tempnology LLC) (Sklar, Daniel) (Entered: 09/21/2015)
09/21/2015	153 (5 pgs; 2 docs)	Proposed Order Filed by Debtor Tempnology LLC (RE: related document(s) 35 Motion to Assume/Reject filed by Debtor Tempnology LLC) (Attachments: # 1 Schedule A - Executory Contracts) (Sklar, Daniel). Modified

		on 9/21/2015 to remove link to doc. no. 132 (hk). (Entered: 09/21/2015)
09/21/2015	154 (6 pgs; 2 docs)	Proposed Order *Pursuant to Bankruptcy Code Sections 105(a) and 366(A) Approving Debtor's Proposed Adequate Assurance of Payment to Utility Companies, and (B) Prohibiting Utility Companies from Altering, Refusing or Discontinuing Service* Filed by Debtor Tempnology LLC (RE: related document(s) 11 Motion filed by Debtor Tempnology LLC) (Attachments: # 1 Exhibit 1 - Utility Services List) (Sklar, Daniel). Modified on 9/21/2015 to remove link to doc. no. 129 (hk). (Entered: 09/21/2015)
09/21/2015	155 (6 pgs)	Proposed Order *Pursuant to Bankruptcy Code Sections 105(a), 345(B), 363(c)(1), 364(a), 364(b), and 503(b)(1), and Bankruptcy Rules 6003 and 6004 (A) Authorizing Debtor to Use Existing Cash Management System, (B) Authorizing and Directing Banks and Financial Institutions to Honor and Process Checks and Transfers, and (C) Authorizing Debtor to Use Existing Bank Accounts and Existing*

		Business Forms Filed by Debtor Tempnology LLC (RE: related document(s) 7 Motion filed by Debtor Tempnology LLC) (Sklar, Daniel). Modified on 9/21/2015 to remove link to doc. no. 128 (hk). (Entered: 09/21/2015)
09/21/2015	156 (4 pgs)	Equity Security Holders, Statement of Parent/Public Companies Filed by Debtor Tempnology LLC (RE: related document(s) 9 Notice to File Missing Documents (Chapter 11)) (Sklar, Daniel) (Entered: 09/21/2015)
09/21/2015	157 (6 pgs)	Order Granting Motion OF DEBTOR PURSUANT TO BANKRUPTCY CODE SECTIONS 105(a) AND 366 (A) APPROVING DEBTORS PROPOSED ADEQUATE ASSURANCE OF PAYMENT TO UTILITY COMPANIES, AND(B) PROHIBITING UTILITY COMPANIES FROM ALTERING, REFUSING OR DISCONTINUING SERVICE (Related Doc # 11) Signed on 9/21/2015. (hk) (Entered: 09/21/2015)
09/21/2015	158 (5 pgs)	Order Granting Omnibus Motion to Reject Executory Contracts

		Nunc Pro Tunc to the Petition date with Delco Illuminacio y Compementos, Trainers Choice, UK Sports Product, CAI Marketing Group, Hyman Intl, CIA Global Group Ltd, Yija International Trade Group, Cool Canuck, Mission Product Holdings, Ryan Drew, Justin Cupps, SKS Trade, LHR de Mexico, Perennial Sales (Related Doc # 35) Signed on 9/21/2015. (hk) (Entered: 09/21/2015)
09/22/2015	159 (6 pgs)	Order Granting Motion of Debtor for Entry of Interim and Final Orders, Pursuant to Bankruptcy Code Sections 105(a), 345(b), 363(c)(1), 364(a), 364(b), and 503(b)(1) and Bankruptcy Rules 6003 and 6004, (A) Authoriziing Debtor to Use Existing Cash Management System, (B) Authorizing and Directing Banks and Financial Institutions to Honor and Process Checks and Transfers, and (C) Authorizing Debtor to Use Existing Bank Accounts and Existing Businiess Forms (Related Doc # 7) Signed on 9/22/2015. (hk) (Entered: 09/22/2015)
09/23/2015	160	** Stricken Per Order Entered

		9/23/2015** Order to Continue/Schedule Hearing with respect to the MP Agreement(RE: related document(s) 35 Motion to Assume/Reject filed by Debtor Tempnology LLC) Hearing scheduled for 10/2/2015 at 09:00 AM at Courtroom 1, 1000 Elm Street, 11th Floor, Manchester, NH. Signed on 9/23/2015 to add docket text re: MP Agreement ((mjc) Modified on 9/25/2015 (mjc). (Entered: 09/23/2015)
09/23/2015	161	Hearing Set On (RE: related document(s)14 Motion for Adequate Protection filed by Debtor Tempnology LLC, Motion to Use Cash Collateral, 35 Motion to Assume/Reject filed by Debtor Tempnology LLC). Hearing scheduled for 10/2/2015 at 09:00 AM at Courtroom 1, 1000 Elm Street, 11th Floor, Manchester, NH. (mjc) (Entered: 09/23/2015)
09/23/2015	162	Hearing Set On (RE: related document(s)34 Motion to Approve filed by Debtor Tempnology LLC). Hearing scheduled for 10/2/2015 at 09:00 AM at Courtroom 1, 1000 Elm Street, 11th Floor, Manchester, NH. (mjc) (Entered: 09/23/2015)

09/23/2015	163 (2 pgs)	Proposed Order *Second Interim (A) Authorizing Debtor to Obtain Post-Petition Financing, (B) Authorizing The Use Of Cash Collateral, (C) Granting Adequate Protection, and (D) Setting a Final Hearing* Filed by Debtor Tempnology LLC (RE: related document(s) 14 Motion for Adequate Protection filed by Debtor Tempnology LLC, Motion to Use Cash Collateral) (Sklar, Daniel) (Entered: 09/23/2015)
09/23/2015	164 (4 pgs; 3 docs)	Ex Parte Motion to Approve Appointment of Examiner Filed by U.S. Trustee Office of the U.S. Trustee (RE: related document(s) 138 Order on Motion to Appoint Examiner) (Attachments: # 1 Affidavit # 2 Proposed Order) (Dirsa, Ann) (Entered: 09/23/2015)
09/23/2015	165 (1 pg)	Notice/Certificate Appointing Examiner . Michael S. Askenaizer added to case. Filed by U.S. Trustee Office of the U.S. Trustee (Dirsa, Ann) (Entered: 09/23/2015)
09/23/2015	166 (6 pgs)	BNC Certificate of Notice - PDF Document. (RE: related document(s) 158 Order on Motion to

		Assume/Reject). No. of Notices: 1. Notice Date 09/23/2015. (Admin.) (Entered: 09/24/2015)
09/23/2015	167 (7 pgs)	BNC Certificate of Notice - PDF Document. (RE: related document(s) 157 Order). No. of Notices: 1. Notice Date 09/23/2015. (Admin.) (Entered: 09/24/2015)
09/24/2015	168	341 Meeting of Creditors Held and Concluded. Debtor(s) sworn. Filed by U.S. Trustee Office of the U.S. Trustee (RE: related document(s) 18 Meeting of Creditors (Chapter 11)) (Dirsa, Ann) (Entered: 09/24/2015)
09/24/2015	169 (1 pg)	Notice of Inability to Appoint Official Creditors' Committee Filed by U.S. Trustee Office of the U.S. Trustee (Dirsa, Ann) (Entered: 09/24/2015)
09/24/2015	170 (2 pgs)	Order Granting Second Interm Order (A) Authorizing Debtor to Obtain Post-Petition Financing, (B) Authorizing the use of Cash Collateral, (C) Granting Adequate Protection and (D) Setting a Final Hearing. Signed on 9/24/2015 (RE: related document(s) 14 Motion for Adequate Protection filed by Debtor Temp-

		nology LLC, Motion to Use Cash Collateral) (jtp) (Entered: 09/24/2015)
09/24/2015	171 (1 pg)	Order Granting Ex Parte Motion to Approve Appointment of Examiner (Related Doc # 164) Signed on 9/24/2015. (jtp) (Entered: 09/24/2015)
09/24/2015	172 (7 pgs)	BNC Certificate of Notice - PDF Document. (RE: related document(s) 159 Order). No. of Notices: 1. Notice Date 09/24/2015. (Admin.) (Entered: 09/25/2015)
09/25/2015	173	Order Striking Order (Court Doc. No.160). The document filed is stricken as being incomplete or unreadable. Signed on 9/25/2015 /s/ Judge Bruce A. Harwood (RE: related document(s) 160 Order to Continue/Schedule Hearing)No PDF Attached (mjc) (Entered: 09/25/2015)
09/25/2015	174 (1 pg)	Order Reassigning Case. Judge J. Michael Deasy added to case. Involvement of Judge Bruce A. Harwood ended. The Hearings currently scheduled for October 2, 2015 at 9:00 am and October 8, 2015 at 1:30 pm will proceed as scheduled in Courtroom 2. Signed

		on 9/25/2015 (RE: related document(s) 1 Voluntary Petition (Chapter 11) filed by Debtor Tempnology LLC) (jtp) (Entered: 09/25/2015)
09/26/2015	175 (2 pgs)	BNC Certificate of Notice - PDF Document. (RE: related document(s) 171 Order on Motion to Approve). No. of Notices: 3. Notice Date 09/26/2015. (Admin.) (Entered: 09/27/2015)
09/26/2015	176 (3 pgs)	BNC Certificate of Notice - PDF Document. (RE: related document(s) 170 Order). No. of Notices: 3. Notice Date 09/26/2015. (Admin.) (Entered: 09/27/2015)
09/27/2015	177 (5 pgs)	BNC Certificate of Notice - PDF Document. (RE: related document(s) 174 Order Reassigning Case). No. of Notices: 138. Notice Date 09/27/2015. (Admin.) (Entered: 09/28/2015)
09/30/2015	178 (1 pg)	Notice of Dismissal (Contingent). This case shall be dismissed after October 21, 2015 For Failure to Submit Declaration Regarding Electronic Filing - LBF 5005-4 re: Chapter 11 Voluntary Petition Doc. No. 1 unless the missing documents/fees are

		filed/submitted and/or paid. (RE: related document(s)1 Voluntary Petition (Chapter 11) filed by Debtor Tempnology LLC). Case to be Dismissed Unless Conditions Met on or before 10/21/2015. (gll) (Entered: 09/30/2015)
09/30/2015	179 (16 pgs)	Memorandum of Law Filed by Debtor Tempnology LLC (RE: related document(s) 34 Motion to Approve filed by Debtor Tempnology LLC, 35 Motion to Assume/Reject filed by Debtor Tempnology LLC) (Sklar, Daniel) (Entered: 09/30/2015)
09/30/2015	180 (72 pgs; 8 docs)	Report of Examiner's First Interim Report Filed by Examiner Michael S. Askenaizer (Attachments: # 1Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7) (Askenaizer, Michael) (Entered: 09/30/2015)
10/02/2015	181 (1 pg)	Order to Continue/Schedule Hearing, Order Directing Tempnology LLC to File Proposed Order on or before 10/9/15. Signed on 10/2/2015 (RE: related document(s) 14 Motion for Adequate Protection filed by Debtor Tempnology LLC, Motion to Use Cash

		Collateral) Hearing scheduled for 11/18/2015 at 09:00 AM at Courtroom 2, 1000 Elm Street, 11th Floor, Manchester, NH. Proposed Order due on or before 10/9/2015. (jtp) (Entered: 10/02/2015)
10/02/2015	182 (1 pg)	Order Directing Tempnology LLC to File Proposed Order on or before 10/9/15. Signed on 10/2/2015 (RE: related document(s) 34 Motion to Approve filed by Debtor Tempnology LLC) Proposed Order due on or before 10/9/2015. (jtp) (Entered: 10/02/2015)
10/02/2015	183 (1 pg)	Notice of Rescheduled Hearing TIME CHANGE ONLY(RE: related document(s)29 Application to Employ filed by Debtor Tempnology LLC, 30 Application to Employ filed by Debtor Tempnology LLC, 31Application to Employ filed by Debtor Tempnology LLC). Hearing scheduled for 10/8/2015 at 10:00 AM at Courtroom 2, 1000 Elm Street, 11th Floor, Manchester, NH. (mbs) (Entered: 10/02/2015)
10/02/2015	184 (2 pgs)	BNC Certificate of Notice. (RE: related document(s) 178 Notice of Dismissal (Contingent)). No. of

		Notices: 1. Notice Date 10/02/2015. (Admin.) (Entered: 10/03/2015)
10/02/2015	188 (1 pg)	Order Granting Motion To Reject the contract of Mission Product Holdings (Related Doc # 35) Signed on 10/2/2015. (jtp) (Entered: 10/05/2015)
10/04/2015	185 (5 pgs)	BNC Certificate of Notice. (RE: related document(s) 183 Notice of Rescheduled Hearing). No. of Notices: 141. Notice Date 10/04/2015. (Admin.) (Entered: 10/05/2015)
10/04/2015	186 (2 pgs)	BNC Certificate of Notice - PDF Document. (RE: related document(s) 181 Order to Continue/Schedule Hearing). No. of Notices: 3. Notice Date 10/04/2015. (Admin.) (Entered: 10/05/2015)
10/04/2015	187 (2 pgs)	BNC Certificate of Notice - PDF Document. (RE: related document(s) 182 Order Directing). No. of Notices: 3. Notice Date 10/04/2015. (Admin.) (Entered: 10/05/2015)
10/06/2015	189 (9 pgs; 3 docs)	Ex Parte Application to Employ Ryan M. Borden of Ford & McPartlin, PA as General Coun-

		sel Filed by Examiner Michael S. Askenaizer (Attachments: # 1 Affidavit Rule 2014(a) Statement of Ryan M. Borden # 2Proposed Order) (Borden, Ryan) (Entered: 10/06/2015)
10/06/2015	190 (9 pgs; 3 docs)	Proposed Order *Authorizing Debtor to Employ Professionals Utilized in the Ordinary Course of Business* Filed by Debtor Tempnology LLC (RE: related document(s) 31 Application to Employ filed by Debtor Tempnology LLC) (Attachments: # 1 Exhibit 1 - Ordinary Course Professionals # 2 Exhibit 2 - Ordinary Course Professional Declaration) (Sklar, Daniel) (Entered: 10/06/2015)
10/07/2015	191 (101 pgs; 6 docs)	Proposed Order *(A) Approving Procedures In Connection With The Sale Of Substantially All Of Debtors Assets; (B) Scheduling Related Auction And Hearing To Consider Approval Of Sale; (C) Approving Procedures Related To The Assumption And Assignment Of Executory Contracts And Unexpired Leases; (D) Approving The Form And Manner Of Notice Thereof; And (E) Granting Related Relief* Filed by

		Debtor Tempnology LLC (RE: related document(s) 34 Motion to Approve filed by Debtor Tempnology LLC) (Attachments: # 1 Exhibit 1 - Bidding Procedures # 2 Exhibit 2 - Asset Purchase Agreement # 3 Exhibit 3 - Procedures Notice # 4 Exhibit 4 - Notice of Assumption and Assignment # 5 Exhibit 1 to Exhibit 4 - Assumed Contracts) (Sklar, Daniel) (Entered: 10/07/2015)
10/07/2015	192 (2 pgs)	BNC Certificate of Notice - PDF Document. (RE: related document(s) 188 Order on Motion to Assume/Reject). No. of Notices: 3. Notice Date 10/07/2015. (Admin.) (Entered: 10/08/2015)
10/08/2015	193 (1 pg)	Order Granting Application to Employ Ford & McPartlin, P.A. (Related Doc # 189) Signed on 10/8/2015. (jtp) (Entered: 10/08/2015)
10/08/2015	194 (101 pgs)	Order Granting Motion To Approving Procedures in Connection with the Sale of Substantially all of Debtor's Assets; (B) Scheduling related Acution and Haring to Consider Approval of Sale; (C) Approving Procedures related to the Assumption and Assignment

		of Executory Contracts and Unexpired Leases; (D) Approving the Form and manner of Notice thereof; and (E) Ganting Related Relief.(Related Doc # 34) Signed on 10/8/2015. (jtp) (Entered: 10/08/2015)
10/08/2015	195 (1 pg)	Order to Continue Hearing on Application to Employ of Phoenix Capital Resources as Investment Banker on a contingent basis. The Court may approve the Applicaiton prior if an agreed upon proposed order is submitted. Signed on 10/8/2015 (RE: related document(s) 29 Application to Employ filed by Debtor Tempnology LLC) Hearing scheduled for 10/20/2015 at 09:00 AM at Courtroom 2, 1000 Elm Street, 11th Floor, Manchester, NH. (jtp) (Entered: 10/08/2015)
10/08/2015	196 (5 pgs)	Order Granting Application to Employ of Nixon Peabody LLP as Counsel Nunc Pro Tunc to the Petition Date (Related Doc # 30) Signed on 10/8/2015. (jtp) (Entered: 10/08/2015)
10/08/2015	197 (9 pgs)	Order Granting Application to Employ Baker Newman Noyes, and Caseiro Burke LLC, and

		Greenberg Traurig, LLC, and Stebbins, Lazos & Van Der Beken, P.A., and Tucker & Latifi LLP (Related Doc # 31) Signed on 10/8/2015. (jtp) (Entered: 10/08/2015)
10/08/2015	199 (12 pgs)	Notice of Sale Procedures, Auction Date, and Sale Hearing Filed by Debtor Tempnology LLC (Sklar, Daniel) (Entered: 10/08/2015)
10/08/2015	200 (13 pgs; 2 docs)	Notice of Assumption and Assignment of Contract and Lease Filed by Debtor Tempnology LLC (Attachments: # 1 Exhibit 1 - Assumed Contracts) (Sklar, Daniel) (Entered: 10/08/2015)
10/08/2015	201 (3 pgs)	Proposed Order *Third Interim (A) Authorizing Debtor to Obtain Post -Petition Financing, (B) Authorizing the Use of Cash Collateral, (C) Granting Adequate Protection, And (D) Setting a Final Hearing* Filed by Creditor Schleicher & Stebbins Hotels, L.L.C. (RE: related document(s) 14 Motion for Adequate Protection filed by Debtor Tempnology LLC, Motion to Use Cash Collateral) (Candon, Christopher)

(Entered: 10/08/2015)

10/09/2015	202 (3 pgs)	Order Granting Third Interim Order (A) Authoriizing Debtor to Obtain Post-Petition Financing, (B) Authorizing the Use of Cash Collateral, (C) Granting Adequate Protection and (D) Setting a Final Hearing Signed on 10/9/2015 (RE: related document(s) 14 Motion for Adequate Protection filed by Debtor Tempnology LLC, Motion to Use Cash Collateral) (jtp) (Entered: 10/09/2015)
10/09/2015	203 (2 pgs)	Notice of Appearance and Request for Notice by Edmond J. Ford Filed by Examiner Michael S. Askenaizer (Ford, Edmond) (Entered: 10/09/2015)
10/10/2015	204 (102 pgs)	BNC Certificate of Notice - PDF Document. (RE: related document(s) 194 Order on Motion to Approve). No. of Notices: 4. Notice Date 10/10/2015. (Admin.) (Entered: 10/11/2015)
10/10/2015	205 (2 pgs)	BNC Certificate of Notice - PDF Document. (RE: related document(s) 195 Order to Continue/Schedule Hearing). No. of Notices: 4. Notice Date 10/10/2015.

(Admin.) (Entered: 10/11/2015)

10/10/2015	206 (2 pgs)	BNC Certificate of Notice - PDF Document. (RE: related document(s) 193 Order on Application to Employ). No. of Notices: 4. Notice Date 10/10/2015. (Admin.) (Entered: 10/11/2015)
10/10/2015	207 (6 pgs)	BNC Certificate of Notice - PDF Document. (RE: related document(s) 196 Order on Application to Employ). No. of Notices: 5. Notice Date 10/10/2015. (Admin.) (Entered: 10/11/2015)
10/10/2015	208 (10 pgs)	BNC Certificate of Notice - PDF Document. (RE: related document(s) 197 Order on Application to Employ). No. of Notices: 10. Notice Date 10/10/2015. (Admin.) (Entered: 10/11/2015)
10/11/2015	209 (4 pgs)	BNC Certificate of Notice - PDF Document. (RE: related document(s) 202 Order). No. of Notices: 10. Notice Date 10/11/2015. (Admin.) (Entered: 10/12/2015)
10/15/2015	210 (26 pgs)	Debtor-In-Possession Monthly Operating Report for Reporting Period September 30, 2015 Filed by Debtor Tempnology LLC (Sklar, Daniel) (Entered:

10/15/2015)

10/15/2015	211 (74 pgs; 4 docs)	Motion *for Determination of Applicability and Scope of Mission Product Holdings, Inc.'s Election Pursuant to 11 U.S.C. Section 365(n)(1)(B)* Filed by Debtor Tempnology LLC Hearing scheduled for 11/3/2015 at 11:00 AM at Courtroom 2, 1000 Elm Street, 11th Floor, Manchester, NH. (Attachments: # 1 Exhibit A - Co-Marketing and Distribution Agreement # 2 Proposed Order # 3 Notice of Hearing) (Sklar, Daniel) (Entered: 10/15/2015)
10/15/2015	212 (10 pgs; 2 docs)	Proposed Order Filed by Debtor Tempnology LLC (RE: related document(s) 29 Application to Employ filed by Debtor Tempnology LLC) (Attachments: # 1 Redlined Version of Proposed Order) (Sklar, Daniel) (Entered: 10/15/2015)
10/15/2015	213 (10 pgs)	****Entered In Error**** Amended Schedule F. Fee Amount $ 30, Amendment to Creditor Matrix. Fee Amount $ 30. *Amendment to Schedule B, Statement of Financial Affairs and List of Creditors Holding 20 Largest Unsecured Claims* Filed by Debtor Temp-

		nology LLC Proofs of Claims for added creditors due by 1/13/2016. Proofs of Claims for added creditors due by 1/13/2016. (Sklar, Daniel) Modified on 10/16/2015 Reason document was entered in error. (i.e. no debtor verification re: amendment) (jtp). (Entered: 10/15/2015)
10/15/2015	214	Receipt of Amended Schedules D,E,F (FEE)(15-11400-JMD) [misc,amdscha] (30.00) filing fee. Receipt number 3000677, Fee amount $ 30.00. (re: Doc#213). (U.S. Treasury) (Entered: 10/15/2015)
10/15/2015	215	Receipt of Amended Creditor Matrix (FEE)(15-11400-JMD) [misc,amdcma] (30.00) filing fee. Receipt number 3000677, Fee amount $ 30.00 (re: Doc#213). (U.S. Treasury) (Entered: 10/15/2015)
10/16/2015	216 (1 pg)	Notice to Counsel Electronically Filing Amendment to Schedules. Amendments to Schedules must be verified/signed by the debtor and the attorney for the debtor using the /s/ NAME signature. Bankruptcy Rule 9011(a) and 1008; 28 U.S.C. section 1746. The

		amendment filed on 10/15/15, court document number 213 is being marked as entered in error. (RE: related document(s)213 Amended Schedules D,E,F (FEE) filed by Debtor Tempnology LLC, Amended Creditor Matrix (FEE)). (jtp) (Entered: 10/16/2015)
10/16/2015	217 (27 pgs)	Amended Schedule B, F, Statement of Financial Affairs, List of Creditors Holding 20 Largest Unsecured Claims, Creditor Matrix. Receipt Number N/A, Fee Amount $ 30 Filed by Debtor Tempnology LLC Proofs of Claims for added creditors due by 1/16/2016. (Sklar, Daniel) Modified on 10/19/2015 to add schedules(jtp). (Entered: 10/16/2015)
10/18/2015	218 (2 pgs)	BNC Certificate of Notice. (RE: related document(s) 216 Notice of Amendment with No Debtor's Verification). No. of Notices: 1. Notice Date 10/18/2015. (Admin.) (Entered: 10/19/2015)
10/19/2015	219 (2 pgs)	Statement of Chris A. Caseiro, on Behalf of Caseiro Burke, LLC Filed by Debtor Tempnology LLC (RE: related document(s) 31 Application to Employ

		filed by Debtor Tempnology LLC) (Sklar, Daniel) (Entered: 10/19/2015)
10/19/2015	220 (2 pgs)	Statement of Robert L. Tucker on Behalf of the Law Firm of Tucker & Latifi, LLP Filed by Debtor Tempnology LLC (RE: related document(s) 31 Application to Employ filed by Debtor Tempnology LLC) (Sklar, Daniel) (Entered: 10/19/2015)
10/20/2015	222 (1 pg)	Order Striking Certificate of Service (Court Doc. No. 221) for Failure to Comply with Local Bankruptcy Rule 5005-4 and Administrative Order 5005-4. The document was not signed by counsel. Signed on 10/20/2015 (RE: related document(s) 221 Certificate of Service filed by Debtor Tempnology LLC) (jtp) (Entered: 10/20/2015)
10/20/2015	223 (21 pgs; 2 docs)	Proposed Order Filed by Debtor Tempnology LLC (RE: related document(s) 29 Application to Employ filed by Debtor Tempnology LLC) (Attachments: # 1 Exhibit A - Engagement Letter of Phoenix Capital Resources) (Sklar, Daniel) (Entered:

10/20/2015)

10/20/2015	224 (2 pgs)	Certificate of Service Filed by Debtor Tempnology LLC (RE: related document(s) 219 Statement filed by Debtor Tempnology LLC, 220 Statement filed by Debtor Tempnology LLC) (Sklar, Daniel) (Entered: 10/20/2015)
10/20/2015	225 (21 pgs)	Order Granting Application to Employ Phoenix Capital Resources as Investment Banker Nunc Pro Tunc to the Petition date, Approving Proposed Fee Structure and waiving certain requirements of Local Bankruptcy Rule 2016-1 (Related Doc # 29) Signed on 10/20/2015. (jtp) (Entered: 10/20/2015)
10/20/2015	226	Order Striking Notice of Appearance and Request for Notice by James F. Raymond (Court Doc. No. 198). The document was filed into the incorrect case. Signed on 10/20/2015 /s/ Judge J.Michael Deasy (RE: related document(s) 198 Notice of Appearance filed by Creditor City of Portsmouth) (jtp) (Entered: 10/20/2015)

10/22/2015	227 (4 pgs)	Statement of Dana J. Banks, on Behalf of Baker Newman & Noyes LLC Filed by Debtor Tempnology LLC (RE: related document(s) 31 Application to Employ filed by Debtor Tempnology LLC) (Sklar, Daniel) (Entered: 10/22/2015)
10/22/2015	228 (4 pgs)	Statement of Greenberg Traurig, LLP Filed by Debtor Tempnology LLC (RE: related document(s) 31Application to Employ filed by Debtor Tempnology LLC) (Sklar, Daniel) (Entered: 10/22/2015)
10/22/2015	229 (3 pgs)	BNC Certificate of Notice. (RE: related document(s) 222 Order Striking Document Not Signed by Counsel). No. of Notices: 13. Notice Date 10/22/2015. (Admin.) (Entered: 10/23/2015)
10/22/2015	230 (22 pgs)	BNC Certificate of Notice - PDF Document. (RE: related document(s) 225 Order on Application to Employ). No. of Notices: 11. Notice Date 10/22/2015. (Admin.) (Entered: 10/23/2015)
10/27/2015	231 (8 pgs)	Objection Filed by Creditor Mission Product Holdings, Inc. (RE: related document(s) 211 Motion

		filed by Debtor Tempnology LLC) (Klass, Michael) (Entered: 10/27/2015)
11/02/2015	232 (9 pgs)	Reply *To Mission Product Holdings, Inc.s Objection To Debtors Motion For Determination Of The Applicability And Scope Of Mission Product Holdings, Inc.s Election Pursuant To 11 U.S.C. § 365(N)(1)(B)*Filed by Debtor Tempnology LLC (RE: related document(s) 211 Motion filed by Debtor Tempnology LLC, 231 Objection filed by Creditor Mission Product Holdings, Inc.) (Sklar, Daniel) (Entered: 11/02/2015)
11/03/2015	233 (1 pg)	Order Under Advisement Motion for Determination of Applicability and Scope of Mission Product Holdings, Inc.'s Election Pursuant to 11 U.S.C. Section 365(n)(1)(B)(Related Doc # 211) Signed on 11/3/2015. (jtp) (Entered: 11/03/2015)
11/05/2015	234 (2 pgs)	BNC Certificate of Notice - PDF Document. (RE: related document(s) 233 Order). No. of Notices: 11. Notice Date 11/05/2015. (Admin.) (Entered: 11/06/2015)

11/06/2015	235 (5 pgs)	Notice of Successful Bidder Filed by Debtor Tempnology LLC (Sklar, Daniel) (Entered: 11/06/2015)
11/09/2015	236 (6 pgs; 2 docs)	Motion to Extend Time for the Examiner to file his report with respect to the sale procedure in this matter to November 15, 2015 Filed by Examiner Michael S. Askenaizer (RE: related document(s) 138 Order on Motion to Appoint Examiner) (Attachments: # 1 Proposed Order) (McPartlin, Richard) (Entered: 11/09/2015)
11/09/2015	237 (1 pg)	Order Granting Motion to Extend Time for the Examiner to file his report with respect to the sale procedure to November 13, 2015 (related document(s): 236 Motion to Extend Time filed by Examiner Michael S. Askenaizer) . Signed on 11/9/2015. (jtp) (Entered: 11/09/2015)
11/11/2015	238 (2 pgs)	BNC Certificate of Notice - PDF Document. (RE: related document(s) 237 Order on Motion to Extend Time). No. of Notices: 11. Notice Date 11/11/2015. (Admin.) (Entered: 11/12/2015)

11/12/2015	239 (12 pgs)	Memorandum Opinion issued by Judge J. Michael Deasy Mission Product Holdings, Inc. does not retain rights to the Debtor's Trademakes and Logos Post-Rejection. Signed on 11/12/2015 (RE: related document(s) 211 Motion filed by Debtor Tempnology LLC) (jtp) (Entered: 11/12/2015)
11/12/2015	240 (1 pg)	Order Granting Motion for Determination of Applicability and Scope of Mission Product Holdings, Inc.'s Election Pursuant to 11 U.S.C. Section 365(n)(1)(B) (Related Doc # 211) Signed on 11/12/2015. (jtp) (Entered: 11/12/2015)
11/12/2015	241 (7 pgs)	Statement of Challenge to Credit Bid of Pre-Petition Credit of Schleicher & Steibbins Hotels, LLC Filed by Creditor Mission Product Holdings, Inc. (Keach, Robert) (Entered: 11/12/2015)
11/12/2015	242 (4 pgs)	Notice of Appeal and Statement of Election to Bankruptcy Appellate Panel. Fee Amount $298 Filed by Creditor Mission Product Holdings, Inc. (RE: related document(s) 239 Memorandum Opinion, 240 Order) (Keach, Rob-

ert) (Entered: 11/12/2015)

11/12/2015	243	Receipt of Notice of Appeal and Statement of Election(15-11400-JMD) [appeal,ntcaplel] (298.00) filing fee. Receipt number 3013500, Fee amount $ 298.00. (re: Doc#242). (U.S. Treasury) (Entered: 11/12/2015)
11/12/2015	244 (115 pgs; 3 docs)	Objection *to Conduct of Auction and Sale* Filed by Creditor Mission Product Holdings, Inc. (RE: related document(s) 34 Motion to Approve filed by Debtor Tempnology LLC) (Attachments: # 1 Exhibit A # 2Exhibit B) (Keach, Robert) (Entered: 11/12/2015)
11/12/2015	245 (70 pgs; 4 docs)	****Administratively Corrected**** Supplemental Motion to Use Cash Collateral , Motion for Adequate Protection Filed by Debtor Tempnology LLC (Attachments: # 1 Exhibit A - New Budget # 2 Proposed Order Final (Clean) - Exhibit B # 3 Proposed Order Final (Redline) -Exhibit C) (Sklar, Daniel) Modified on 11/13/2015 Re-entered onto docket by Clerks Office; Incorrect filing event used. (jtp). (Entered: 11/12/2015)

11/12/2015	246 (116 pgs; 3 docs)	Amended Objection *to Conduct of Auction and Sale* Filed by Creditor Mission Product Holdings, Inc. (RE: related document(s) 34 Motion to Approve filed by Debtor Tempnology LLC, 244 Objection filed by Creditor Mission Product Holdings, Inc.) (Attachments: # 1 Exhibit A # 2 Exhibit B) (Keach, Robert) (Entered: 11/12/2015)
11/12/2015	247 (70 pgs; 4 docs)	Supplement to Motion Filed by Debtor Tempnology LLC (RE: related document(s) 14 Motion for Adequate Protection filed by Debtor Tempnology LLC, Motion to Use Cash Collateral) (Attachments: # 1 Exhibit A - New Budget # 2 Proposed Order Final (Clean) - Exhibit B # 3 Proposed Order Final (Redline)-Exhibit C) (jtp) (Entered: 11/13/2015)
11/13/2015	248	An Administrative Error was found with the filing of Supplemental Motion to Use Cash Collateral, Motion for Adequate Protection (Court Doc. No. 245). The incorrect filing event was used. The Clerks Office has re-entered the document onto the case docket using the correct filing event. (RE: related docu-

		ment(s)245 Motion to Use Cash Collateral filed by Debtor Tempnology LLC, Motion for Adequate Protection). (jtp) (Entered: 11/13/2015)
11/13/2015	249	Court's Certificate of Mailing of Appeal. Date copies electronically mailed: 11/12/15 Copies electronically mailed to: Michael Askenazier, Ryan Borden, Christopher Candon, Roma Desai, Ann marie Dirsa, Edmond Ford, Robert Keach, Michael Klass, Jessica Lewis, Richard McPartlin, James Raymond, Daniel Sklar, Steven Venezia, Office of the U.S. Trustee (RE: related document(s)242 Notice of Appeal and Statement of Election filed by Creditor Mission Product Holdings, Inc.). (jtp) (Entered: 11/13/2015)
11/13/2015	250 (45 pgs; 2 docs)	Transmittal of Appeal to BAP (RE: related document(s)242 Notice of Appeal and Statement of Election filed by Creditor Mission Product Holdings, Inc.). (Attachments: # 1 Notice of Appeal) (jtp) (Entered: 11/13/2015)
11/13/2015	251	Notice to Appellant re: Notice of

	(1 pg)	Appeal. The following items should be filed on or before 11/27/15. (1) Designation of Items on Appeal, (2) Statement of Issues and (3) Written Notice a Transcript has been Ordered or a Certificate Stating No Transcript is Being Ordered. (RE: related document(s)242 Notice of Appeal and Statement of Election filed by Creditor Mission Product Holdings, Inc.). (jtp) (Entered: 11/13/2015)
11/13/2015	252 (81 pgs; 6 docs)	Report of Examiner's Report Filed by Examiner Michael S. Askenaizer (Attachments: # 1 Exhibit 1, Examiner's Initial Report # 2 Exhibit 2, List of Companies targeted for Auction sale # 3 Exhibit 3, Amended and Restated Forebearance Agreement dated August 17, 2015 # 4 Exhibit 4, S&S Advances from July 16, 2015 through the petition date # 5 Exhibit 5, History of Equity Contributions to debtor) (Ford, Edmond) (Entered: 11/13/2015)
11/14/2015	253 (2 pgs)	BNC Certificate of Notice - PDF Document. (RE: related document(s) 240 Order). No. of Notices: 11. Notice Date 11/14/2015.

(Admin.) (Entered: 11/15/2015)

11/15/2015	254 (2 pgs)	BNC Certificate of Notice. (RE: related document(s) 251 Notice to Appellant re: Appeal). No. of Notices: 11. Notice Date 11/15/2015. (Admin.) (Entered: 11/16/2015)
11/16/2015	255	Notice of Docketing Record on Appeal to BAP. Case Number Assigned: BAP NH 15-0065 (RE: related document(s)242 Notice of Appeal and Statement of Election filed by Creditor Mission Product Holdings, Inc.). (jtp) (Entered: 11/16/2015)
11/16/2015	256 (115 pgs; 9 docs)	Motion to Amend *Examiner's Report* Filed by Examiner Michael S. Askenaizer (RE: related document(s) 252Report filed by Examiner Michael S. Askenaizer) (Attachments: # 1 Exhibit A, to Motion to Amend # 2Exhibit B, to Motion to Amend # 3 Exhibit 1, to Exhibit B Amended Examiner's report # 4 Exhibit 2, to Exhibit B, Amended Examiner's Report # 5 Exhibit 3, to Exhibit B, Amended Examiner's Report # 6 Exhibit 4, to Amended Examiner's Report # 7 Exhibit 5, to Amended Examiner's Report # 8 Proposed Order) (Ford, Ed-

mond) (Entered: 11/16/2015)

11/16/2015	257 (14 pgs)	Response *Examiner's Response to Amended Mission Product Holdings, Inc's Objection to Conduct of Auction and Sale* Filed by Examiner Michael S. Askenaizer (RE: related document(s) 246 Objection filed by Creditor Mission Product Holdings, Inc.) (Ford, Edmond) (Entered: 11/16/2015)
11/16/2015	258 (21 pgs; 2 docs)	Reply *to Amended Mission Product Holdings, Inc.'s Objection to Conduct of Auction and Sale* Filed by Debtor Tempnology LLC (RE: related document(s) 246 Objection filed by Creditor Mission Product Holdings, Inc.) (Attachments: # 1 Exhibit A - Schedule Summarizing Each Round of Bids) (Sklar, Daniel) (Entered: 11/16/2015)
11/16/2015	259 (17 pgs)	Statement of in Support of Sale Motion and Response to Mission Product Holdings, Inc.'s Challenge to Credit Bid and Objection to Conduct of Auction and Sale Filed by Creditor Schleicher & Stebbins Hotels, L.L.C. (RE: related docu-

		ment(s) 241 Statement filed by Creditor Mission Product Holdings, Inc., 244 Objection filed by Creditor Mission Product Holdings, Inc.) (Candon, Christopher) (Entered: 11/16/2015)
11/16/2015	260 (2 pgs)	Certificate of Service Filed by Creditor Schleicher & Stebbins Hotels, L.L.C. (RE: related document(s) 259Statement filed by Creditor Schleicher & Stebbins Hotels, L.L.C.) (Candon, Christopher) (Entered: 11/16/2015)
11/17/2015	261 (23 pgs)	Debtor-In-Possession Monthly Operating Report for Reporting Period October 31, 2015 Filed by Debtor Tempnology LLC (Sklar, Daniel) (Entered: 11/17/2015)
11/18/2015	262 (1 pg)	Order Granting Motion To Amend Examiner's Report (Related Doc # 256) Signed on 11/18/2015. (jtp) (Entered: 11/18/2015)
11/18/2015		Hearing Exhibit(s) from Hearing held on 11/18/2015. (RE: related document(s)14 Motion for Adequate Protection filed by Debtor Tempnology LLC, Motion to Use Cash Collateral). (gll) (Entered: 11/18/2015)

11/18/2015	263 (1 pg)	Order to Continue Hearing on Debtors Motion to Sell All or Substantially all of its Assets Signed on 11/18/2015 (RE: related document(s) 194 Order on Motion to Approve) Hearing scheduled for 11/23/2015 at 09:00 AM at Courtroom 2, 1000 Elm Street, 11th Floor, Manchester, NH. (jtp) (Entered: 11/18/2015)
11/18/2015	264 (1 pg)	Order to Continue/Schedule Hearing. Cash Collateral is authorized on the same terms and conditions in prior interim order through November 23, 2015 Signed on 11/18/2015 (RE: related document(s) 14 Motion for Adequate Protection filed by Debtor Tempnology LLC, Motion to Use Cash Collateral) Hearing scheduled for 11/23/2015 at 09:00 AM at Courtroom 2, 1000 Elm Street, 11th Floor, Manchester, NH. (jtp) (Entered: 11/18/2015)
11/20/2015	265 (2 pgs)	BNC Certificate of Notice - PDF Document. (RE: related document(s) 262 Order on Motion to Amend). No. of Notices: 11. Notice Date 11/20/2015. (Admin.) (Entered: 11/21/2015)
11/20/2015	266	BNC Certificate of Notice - PDF

	(2 pgs)	Document. (RE: related document(s) 263 Order to Continue/Schedule Hearing). No. of Notices: 10. Notice Date 11/20/2015. (Admin.) (Entered: 11/21/2015)
11/20/2015	267 (2 pgs)	BNC Certificate of Notice - PDF Document. (RE: related document(s) 264 Order to Continue/Schedule Hearing). No. of Notices: 10. Notice Date 11/20/2015. (Admin.) (Entered: 11/21/2015)
11/23/2015		Hearing Exhibit(s) from Hearing held on 11/23/2015. (RE: related document(s)14 Motion for Adequate Protection filed by Debtor Tempnology LLC, Motion to Use Cash Collateral). (gll) (Entered: 11/23/2015)
11/23/2015	268 (1 pg)	Order Directing Debtro Tempnology LLC to File Proposed Order Signed on 11/23/2015 (RE: related document(s) 14 Motion for Adequate Protection filed by Debtor Tempnology LLC, Motion to Use Cash Collateral) (jtp) (Entered: 11/23/2015)
11/23/2015	269 (1 pg)	Order Directing the Parties to File Proposed Orders and any other closing documents on or or before 12/1/15. Signed on

		11/23/2015 (RE: related document(s) 194 Order on Motion to Approve) Proposed Order due on or before 12/1/2015. (jtp) (Entered: 11/23/2015)
11/24/2015	270 (81 pgs; 6 docs)	Amended Report of Examiner's Report Filed by Examiner Michael S. Askenaizer (Attachments: # 1 Exhibit 1, Examiner's First Interim Report # 2 Exhibit 2, Tracking Sheet # 3 Exhibit 3, Amended & Restated Forbearance Agreement # 4 Exhibit 4, Debt History # 5 Exhibit 5, Capitalization History) (Ford, Edmond) (Entered: 11/24/2015)
11/25/2015	271 (1 pg)	Acknowledgement of Request for Transcript of Testimony. Request was received by the Transcription Service on 11/25/2015. The Reporter Ruth Ann Hager of Cascade Hills Transcription Inc. expects to have the transcript completed by 12/7/2015 (RE: related document(s)242 Notice of Appeal and Statement of Election filed by Creditor Mission Product Holdings, Inc.). (gll) (Entered: 11/25/2015)
11/25/2015	272 (3 pgs)	Statement of Issues on Appeal Filed by Creditor Mission

		Product Holdings, Inc. (RE: related document(s) 242 Notice of Appeal and Statement of Election filed by Creditor Mission Product Holdings, Inc.) (Keach, Robert) (Entered: 11/25/2015)
11/25/2015	273 (3 pgs)	Appellant Designation of Contents For Inclusion in Record On Appeal Filed by Creditor Mission Product Holdings, Inc. (RE: related document(s) 242 Notice of Appeal and Statement of Election filed by Creditor Mission Product Holdings, Inc., 272 Statement of Issues on Appeal filed by Creditor Mission Product Holdings, Inc.) Appellee designation due by 12/9/2015. Transmission of Designation due by 12/28/2015. (Keach, Robert) (Entered: 11/25/2015)
11/25/2015	274 (2 pgs)	Transcript Order placed for Hearing(s) held on November 3, 2015 as included in the Designation of Record on Appeal. Filed by Creditor Mission Product Holdings, Inc. (RE: related document(s) 242 Notice of Appeal and Statement of Election filed by Creditor Mission Product Holdings, Inc., 272 Statement of Issues on Appeal filed by Creditor Mission Product Holdings,

		Inc., 273 Appellant Designation filed by Creditor Mission Product Holdings, Inc.) (Keach, Robert) (Entered: 11/25/2015)
11/25/2015	275 (1 pg)	Certificate of Service Filed by Creditor Mission Product Holdings, Inc. (RE: related document(s) 272Statement of Issues on Appeal filed by Creditor Mission Product Holdings, Inc., 273 Appellant Designation filed by Creditor Mission Product Holdings, Inc., 274 Transcript Ordered re: Appeal filed by Creditor Mission Product Holdings, Inc.) (Keach, Robert) (Entered: 11/25/2015)
11/25/2015	276 (2 pgs)	BNC Certificate of Notice - PDF Document. (RE: related document(s) 268 Order Directing). No. of Notices: 11. Notice Date 11/25/2015. (Admin.) (Entered: 11/26/2015)
11/25/2015	277 (2 pgs)	BNC Certificate of Notice - PDF Document. (RE: related document(s) 269 Order Directing). No. of Notices: 11. Notice Date 11/25/2015. (Admin.) (Entered: 11/26/2015)
12/01/2015	278	Request for Ruling and Findings

	(31 pgs)	of Facts Filed by Creditor Mission Product Holdings, Inc. (Klass, Michael) (Entered: 12/01/2015)
12/01/2015	279 (181 pgs; 6 docs)	Brief *in Support of Sale* Filed by Debtor Tempnology LLC (RE: related document(s) 34 Motion to Approve filed by Debtor Tempnology LLC) (Attachments: # 1 Proposed Order Revised - Exhibit 1-A # 2 Exhibit 1 to Revised Proposed Order - Asset Purchase Agreement # 3 Exhibit 2 to Revised Proposed Order - Assumed Contracts # 4 Proposed Order Revised Redline - Exhibit 1-B # 5 Exhibit 2 - Revised Asset Purchase Agreement - Redline) (Sklar, Daniel) (Entered: 12/01/2015)
12/01/2015	280 (20 pgs; 2 docs)	Statement of in Support of Sale Motion and Entry of Proposed Sale Order Filed by Creditor Schleicher & Stebbins Hotels, L.L.C. (RE: related document(s) 279 Brief filed by Debtor Tempnology LLC) (Attachments: # 1 Exhibit A) (Candon, Christopher) (Entered: 12/01/2015)
12/01/2015	281 (2 pgs)	Certificate of Service Filed by Creditor Schleicher & Stebbins

		Hotels, L.L.C. (RE: related document(s) 280Statement filed by Creditor Schleicher & Stebbins Hotels, L.L.C.) (Candon, Christopher) (Entered: 12/01/2015)
12/02/2015	282 (28 pgs)	Order Granting Motion For Adequate Protection (Related Doc # 14), Granting Motion To Use Cash Collateral (Related Doc # 14) Signed on 12/2/2015. (gll) (Entered: 12/02/2015)
12/03/2015	283 (12 pgs; 2 docs)	Motion to Extend Exclusivity Period for Filing a Chapter 11 Plan and Disclosure Statement Filed by Debtor Tempnology LLC Hearing scheduled for 12/22/2015 at 11:00 AM at Courtroom 1, 1000 Elm Street, 11th Floor, Manchester, NH. (Attachments: # 1 Proposed Order Exhibit A) (Sklar, Daniel) (Entered: 12/03/2015)
12/03/2015	284 (4 pgs)	Notice of Hearing Filed by Debtor Tempnology LLC (RE: related document(s) 283 Motion to Extend/Limit Exclusivity Period filed by Debtor Tempnology LLC) Hearing scheduled for 12/22/2015 at 11:00 AM at Courtroom 1, 1000 Elm Street, 11th Floor, Manchester, NH. (Sklar,

Daniel) (Entered: 12/03/2015)

12/04/2015	285 (12 pgs; 4 docs)	Application for Interim Fees for Ford & McPartlin, P.A., Examiner's Counsel, Period: 10/2/2015 to 12/4/2015, Fee: $41038.20, Expenses: $240.95. Filed by Attorney Ford & McPartlin, P.A. (Attachments: # 1Supplement invoice # 2 Fee Annex - Interim Request # 3 Proposed Order) (Borden, Ryan) Modified on 12/7/2015 to correct type of applicant (hk). (Entered: 12/04/2015)
12/04/2015	286 (4 pgs; 2 docs)	Motion *to Discharge Examiner or Further Instruct* Filed by Attorney Ford & McPartlin, P.A. (Attachments: # 1 Proposed Order) (Borden, Ryan) (Entered: 12/04/2015)
12/04/2015	287 (5 pgs; 2 docs)	Motion to Shorten Notice *Partially assented to* Filed by Attorney Ford & McPartlin, P.A. (RE: related document(s) 285 Application for Interim Fees filed by Attorney Ford & McPartlin, P.A., 286 Motion filed by Attorney Ford & McPartlin, P.A., 288 Application for Final Fees *and Reimbursement of Expenses* for Michael S. Askenaizer) (Attachments: # 1 Proposed Or-

		der) (Borden, Ryan). Modified on 12/7/2015 to add document link (hk). (Entered: 12/04/2015)
12/04/2015	288 (16 pgs; 5 docs)	Application for Final Fees *and Reimbursement of Expenses* for Michael S. Askenaizer, Examiner, Period: 9/23/2015 to 12/4/2015, Fee: $37,363.50, Expenses: $215.48.Filed by Attorney Michael S. Askenaizer (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 - Fee Annex # 3 Exhibit 3 - Time Sheets # 4 Proposed Order) (Askenaizer, Michael) (Entered: 12/04/2015)
12/04/2015	289 (29 pgs)	BNC Certificate of Notice - PDF Document. (RE: related document(s) 282 Order on Motion for Adequate Protection). No. of Notices: 10. Notice Date 12/04/2015. (Admin.) (Entered: 12/05/2015)
12/07/2015	290 (2 pgs)	Acknowledgement of Request for Transcript of Testimony. Request was received by the Transcription Service on 11/25/2015. The Reporter Ruth Ann Hager of Cascade Hills Transcription, Inc. expects to have the transcript completed by 12/2/2015 (RE: related document(s)242 Notice of Appeal and Statement of Election

		filed by Creditor Mission Product Holdings, Inc.). (gll) (Entered: 12/07/2015)
12/07/2015	291 (1 pg)	Acknowledgement of Request for Transcript of Testimony. Request was received by the Transcription Service on 11/23/2015. The Reporter Ruth Ann Hager of Cascade Hills Transcription, Inc. expects to have the transcript completed by 11/25/2015 (RE: related document(s)242 Notice of Appeal and Statement of Election filed by Creditor Mission Product Holdings, Inc.). (gll) (Entered: 12/07/2015)
12/08/2015	292 (2 pgs)	Notice of Payments to Ordinary Course Professionals Filed by Debtor Tempnology LLC (RE: related document(s) 190 Proposed Order filed by Debtor Tempnology LLC) (Sklar, Daniel) (Entered: 12/08/2015)
12/08/2015	293 (1 pg)	Order Granting Motion To Shorten Notice (Related Doc # 287) Signed on 12/8/2015. (hk) (Entered: 12/08/2015)
12/08/2015	294	Hearing Set On (RE: related document(s)285 Application for Interim Fees filed by Spec. Counsel

		Ford & McPartlin, P.A., 286 Motion filed by Spec. Counsel Ford & McPartlin, P.A., 288 Application for Final Fees filed by Examiner Michael S. Askenaizer). Hearing scheduled for 12/22/2015 at 11:00 AM at Courtroom 2, 1000 Elm Street, 11th Floor, Manchester, NH. (hk) (Entered: 12/08/2015)
12/08/2015	295 (9 pgs)	Notice of Hearing Filed by Examiner Michael S. Askenaizer, Spec. Counsel Ford & McPartlin, P.A. (RE: related document(s) 285 Application for Interim Fees filed by Spec. Counsel Ford & McPartlin, P.A., 286Motion filed by Spec. Counsel Ford & McPartlin, P.A., 288 Application for Final Fees filed by Examiner Michael S. Askenaizer, 294 Hearing Scheduled) Hearing scheduled for 12/22/2015 at 11:00 AM at Courtroom 2, 1000 Elm Street, 11th Floor, Manchester, NH. (Borden, Ryan) (Entered: 12/08/2015)
12/08/2015	296 (4 pgs)	Appellee Designation of Contents for Inclusion in Record of Appeal Filed by Debtor Tempnology LLC (RE: related document(s) 242 Notice of Appeal and

		Statement of Election filed by Creditor Mission Product Holdings, Inc., 273 Appellant Designation filed by Creditor Mission Product Holdings, Inc.) (Sklar, Daniel) (Entered: 12/08/2015)
12/08/2015	297 (5 pgs)	Statement of Issues on Appeal *for Appellee* Filed by Debtor Tempnology LLC (RE: related document(s) 242Notice of Appeal and Statement of Election filed by Creditor Mission Product Holdings, Inc.) (Sklar, Daniel) (Entered: 12/08/2015)
12/09/2015	298 (4 pgs)	Transcript Order placed for Hearing(s) held on 10/2/2015 as included in the Designation of Record on Appeal. Filed by Debtor Tempnology LLC (RE: related document(s) 242 Notice of Appeal and Statement of Election filed by Creditor Mission Product Holdings, Inc.) (Sklar, Daniel) (Entered: 12/09/2015)
12/09/2015	299 (33 pgs; 5 docs)	First Application for Interim Fees for Nixon Peabody LLP, Debtor's Attorney, Period: 9/1/2015 to 11/30/2015, Fee: $223,775.50, Expenses: $11,821.20.Filed by Debtor's Attorney Nixon Peabody LLP

		Hearing scheduled for 1/12/2016 at 11:00 AM at Courtroom 2, 1000 Elm Street, 11th Floor, Manchester, NH. (Attachments: # 1Exhibit A - Nixon Peabody Invoice # 2 Fee Annex - Interim Request Exhibit B # 3 Proposed Order Exhibit C # 4 Notice of Hearing) (Sklar, Daniel) (Entered: 12/09/2015)
12/10/2015	300 (2 pgs)	BNC Certificate of Notice - PDF Document. (RE: related document(s) 293 Order on Motion To Shorten Notice). No. of Notices: 1. Notice Date 12/10/2015. (Admin.) (Entered: 12/11/2015)
12/14/2015	301 (446 pgs; 3 docs)	Transmittal of Record on Appeal to BAP (RE: related document(s)242 Notice of Appeal and Statement of Election filed by Creditor Mission Product Holdings, Inc.). (Attachments: # 1 Appellant Record Part 1 of 5 # 2 Appellee Record Part 1 of 1) (jtp) (Entered: 12/14/2015)
12/14/2015	302 (183 pgs; 5 docs)	Transmittal of Record on Appeal to BAP (RE: related document(s)242 Notice of Appeal and Statement of Election filed by Creditor Mission Product Holdings, Inc.). (Attachments:

		# 1 Appellant Record Part 2 of 5 # 2 Appellant Record Part 3 of 5 # 3 Appellant Record Part 4 of 5 # 4 Appellant Record Part 5 of 5) (jtp) (Entered: 12/14/2015)
12/15/2015	303 (5 pgs)	Report of Sale Status Filed by Debtor Tempnology LLC (Sklar, Daniel). Related document(s) 194 Order on Motion to Approve. Modified on 12/15/2015 to add link to doc 194 Order on Motion to Approve(jtp). (Entered: 12/15/2015)
12/15/2015	304 (9 pgs)	Motion *For Clarification of Final Order (A) Authorizing Debtor to Obtain Post-Petition Financing, (B) Authorizing the Use of Cash Collateral, and (C) Granting Adequate Protection* Filed by Creditor Schleicher & Stebbins Hotels, L.L.C. (Candon, Christopher) (Entered: 12/15/2015)
12/18/2015	305 (1 pg)	Hearing Scheduled (RE: related document(s)304 Motion For Clarification of Final Order (A) Authorizing Debtor to Obtain Post-Petition Financing, (B) Authorizing the Use of Cash Collateral, and (C) Granting Adequate Protection Filed by Creditor Schleicher & Stebbins Hotels, L.L.C.

		Hearing scheduled for 12/22/2015 at 11:00 AM at Courtroom 2, 1000 Elm Street, 11th Floor, Manchester, NH. (mbs) (Entered: 12/18/2015)
12/18/2015	306 (38 pgs)	Memorandum Opinion issued by J.Michael Deasy. The sale is approved and the Court will enter a separate order consistent with this Signed on 12/18/2015 (RE: related document(s) 34 Motion to Approve filed by Debtor Tempnology LLC) (jtp) (Entered: 12/18/2015)
12/18/2015	307 (88 pgs)	Order Granting (A) Authorizing the sale of substantially all the Debtor's Assets Free and Clear of Liens, Claims, Encumbrances, and Other Interest, Except as Provided in the Successful Binder's Asset Purchase Agreement; (B) Authorizing and Approving the Asset Purchase Agreement; (C) Approving the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases Related Thereto; and (D) Granting Related Relief. (Related Doc # 34) Signed on 12/18/2015. (jtp) (Entered: 12/18/2015)
12/20/2015	308	BNC Certificate of Notice - Hear-

	(5 pgs)	ing. (RE: related document(s) 305 Hearing Scheduled). No. of Notices: 168. Notice Date 12/20/2015. (Admin.) (Entered: 12/21/2015)
12/20/2015	309 (90 pgs)	BNC Certificate of Notice - PDF Document. (RE: related document(s) 307 Order on Motion to Approve). No. of Notices: 11. Notice Date 12/20/2015. (Admin.) (Entered: 12/21/2015)
12/21/2015	310 (4 pgs)	Notice of Closing Filed by Debtor Tempnology LLC (RE: related document(s) 34 Motion to Approve filed by Debtor Tempnology LLC) (Sklar, Daniel) (Entered: 12/21/2015)
12/21/2015	311 (1 pg)	Proposed Order *Revised* Filed by Spec. Counsel Ford & McPartlin, P.A. (RE: related document(s) 285Application for Interim Fees filed by Spec. Counsel Ford & McPartlin, P.A.) (Borden, Ryan) (Entered: 12/21/2015)
12/21/2015	312 (22 pgs)	Debtor-In-Possession Monthly Operating Report for Reporting Period November 30, 2015 Filed by Debtor Tempnology LLC (Sklar, Daniel) (Entered: 12/21/2015)

12/21/2015	313 (76 pgs; 6 docs)	Objection to Claim Number(s) 6 *Pursuant to Section 502 of the Bankruptcy Code* Filed by Debtor Tempnology LLC Hearing scheduled for 1/19/2016 at 01:30 PM at Courtroom 2, 1000 Elm Street, 11th Floor, Manchester, NH. (Attachments: # 1 Exhibit A - Co-Marketing and Distribution Agreement # 2 Exhibit B - Mission Product Holdings Proof of Claim 6-1 # 3 Exhibit C - Letter Dated April 16, 2015 From Joshau Shaw to Kevin McCarthy # 4 Proposed Order # 5 Notice of Hearing)(Sklar, Daniel) (Entered: 12/21/2015)
12/22/2015	314 (1 pg)	Order Granting Application For Final Fees (Related Doc # 288) Granting for Michael S. Askenaizer, Examiner, fees awarded: $37363.50, expenses awarded: $215.48 Signed on 12/22/2015. (jtp) (Entered: 12/22/2015)
12/22/2015	315 (1 pg)	Order Granting Motion to Discharge Examiner. Michael S. Askenaizer is dicharged and released from his duites as Examiner in this case. (Related Doc # 286) Signed on 12/22/2015. (jtp) (Entered: 12/22/2015)

12/22/2015	316 (2 pgs)	Order Granting Motion to Extend/Limit Exclusivity Period for Filing a Chapter 11 Plan and Disclosure Statement (related document(s): 283 Motion to Extend/Limit Exclusivity Period filed by Debtor Tempnology LLC) Signed on 12/22/2015. Chapter 11 Plan due by 2/29/2016. Disclosure Statement due by 2/29/2016. (jtp) (Entered: 12/22/2015)
12/22/2015		Hearing Held on 12/22/2015 Atty Ford to File Further Revised Proposed Order (RE: related document(s)285Application for Interim Fees filed by Spec. Counsel Ford & McPartlin, P.A.). (mbs) (Entered: 12/22/2015)
12/22/2015	317 (1 pg)	Order Granting Motion For Clarification of Final Order (A) Authorizing Debtor to Obtain Post-Petition Financing, (B) Authorizing the Use of Cash Collateral, and (C) Granting Adequate Protection (Related Doc # 304) Signed on 12/22/2015. (jtp) (Entered: 12/22/2015)
12/22/2015	318 (1 pg)	Proposed Order *as Revised* Filed by Spec. Counsel Ford & McPartlin, P.A. (RE: related doc-

		ument(s) 285Application for Interim Fees filed by Spec. Counsel Ford & McPartlin, P.A.) (Borden, Ryan) (Entered: 12/22/2015)
12/22/2015	319 (6 pgs; 2 docs)	Motion *to Amend Caption* Filed by Debtor Tempnology LLC (Attachments: # 1 Exhibit A - Certificate Confirming Amendment to Change Name) (Sklar, Daniel) (Entered: 12/22/2015)
12/22/2015	320 (1 pg)	Proposed Order Filed by Debtor Tempnology LLC (RE: related document(s) 319 Motion filed by Debtor Tempnology LLC) (Sklar, Daniel) (Entered: 12/22/2015)
12/22/2015	321 (44 pgs; 6 docs)	Application for Final Fees for Phoenix Capital Resources, Other Professional, Period: 9/1/2015 to 12/18/2015, Fee: $145,350.00, Expenses: $7,203.30.Filed by Financial Advisor Phoenix Capital Resources Hearing scheduled for 1/19/2016 at 01:30 PM at Courtroom 2, 1000 Elm Street, 11th Floor, Manchester, NH. (Attachments: # 1 Exhibit A - Engagement Letter of Phoenix Capital Resources # 2 Exhibit B - Summary of Fees # 3 Exhibit C - Summary of Expenses # 4 Proposed Order Exhibit D

		# 5 Notice of Hearing) (Sklar, Daniel) (Entered: 12/22/2015)
12/22/2015	322 (9 pgs; 2 docs)	Ex Parte Motion to Approve Stipulation and Order Authorizing The Use Of Cash Collateral , Joint Motion to Use Cash Collateral Filed by Debtor Tempnology LLC (Attachments: # 1 Proposed Order Exhibit A) (Sklar, Daniel) (Entered: 12/22/2015)
12/22/2015	323 (1 pg)	Order Granting Application For Interim Fees (Related Doc # 285) Granting for Ford & McPartlin, P.A., fees awarded: $45718.95, expenses awarded: $240.95 Signed on 12/22/2015. (jtp) (Entered: 12/23/2015)
12/23/2015	324 (3 pgs)	Order Granting Ex Parte Motion to Approve Stipulation and Order Authorizing The Use Of Cash Collateral , Joint Motion to Use Cash Collateral (Related Doc # 322), Granting Motion To Use Cash Collateral (Related Doc # 322) Signed on 12/23/2015. (jtp) (Entered: 12/23/2015)
12/23/2015	325 (1 pg)	Order Granting Motion to Amend Caption of Case. The Caption of this Chapter 11 case will be amended by replacing "Temp-

		noloy LLC" and replacing it with "Old Cold, LLC" (Related Doc # 319) Signed on 12/23/2015. (jtp) (Entered: 12/23/2015)
12/24/2015	326 (6 pgs)	BNC Certificate of Notice - PDF Document. (RE: related document(s) 316 Order on Motion to Extend/Limit Exclusivity Period). No. of Notices: 165. Notice Date 12/24/2015. (Admin.) (Entered: 12/25/2015)
12/24/2015	327 (3 pgs)	BNC Certificate of Notice - PDF Document. (RE: related document(s) 314 Order on Application for Final Fees). No. of Notices: 11. Notice Date 12/24/2015. (Admin.) (Entered: 12/25/2015)
12/24/2015	328 (3 pgs)	BNC Certificate of Notice - PDF Document. (RE: related document(s) 315 Order). No. of Notices: 11. Notice Date 12/24/2015. (Admin.) (Entered: 12/25/2015)
12/24/2015	329 (3 pgs)	BNC Certificate of Notice - PDF Document. (RE: related document(s) 317 Order). No. of Notices: 11. Notice Date 12/24/2015. (Admin.) (Entered: 12/25/2015)
12/25/2015	330 (5 pgs)	BNC Certificate of Notice - PDF Document. (RE: related docu-

		ment(s) 324 Order on Motion to Approve). No. of Notices: 11. Notice Date 12/25/2015. (Admin.) (Entered: 12/26/2015)
12/25/2015	331 (3 pgs)	BNC Certificate of Notice - PDF Document. (RE: related document(s) 325 Order). No. of Notices: 11. Notice Date 12/25/2015. (Admin.) (Entered: 12/26/2015)
12/25/2015	332 (3 pgs)	BNC Certificate of Notice - PDF Document. (RE: related document(s) 323 Order on Application for Interim Fees). No. of Notices: 11. Notice Date 12/25/2015. (Admin.) (Entered: 12/26/2015)
12/28/2015	333 (4 pgs)	Notice of Appeal and Statement of Election to Bankruptcy Appellate Panel. Fee Amount $298 Filed by Creditor Mission Product Holdings, Inc. (RE: related document(s) 306 Memorandum Opinion, 307 Order on Motion to Approve) (Klass, Michael) (Entered: 12/28/2015)
12/29/2015	334	Court's Certificate of Mailing of Appeal. Date copies electronically mailed: 12/28/15 Copies electronically mailed to: Atty Michael Askenaizer, Atty Ryan Borden, Atty Christopher Candon, Atty

		Roma Desai, Atty Ann Marie Dirsa, Atty Edmond Ford, Atty Robert Keach, Atty Michael Klass, Atty Jessica Lewis, Atty Richard McPartlin, Atty James Raymond, Atty Daniel Sklar, Atty Steven Venezia, Office of the U.S. Trustee (RE: related document(s)333 Notice of Appeal and Statement of Election filed by Creditor Mission Product Holdings, Inc.). (jtp) (Entered: 12/29/2015)
12/29/2015	335	Receipt of Notice of Appeal and Statement of Election(15-11400-JMD) [appeal,ntcaplel] (298.00) filing fee. Receipt number 3033321, Fee amount $ 298.00. (re: Doc#333). (U.S. Treasury) (Entered: 12/29/2015)
12/29/2015	336 (166 pgs; 2 docs)	Transmittal of Appeal to BAP (RE: related document(s)333 Notice of Appeal and Statement of Election filed by Creditor Mission Product Holdings, Inc.). (Attachments: # 1 Notice of Appeal) (jtp) (Entered: 12/29/2015)
12/29/2015	337 (1 pg)	Notice to Appellant re: Notice of Appeal. The following items should be filed on or before

		1/11/2016. (1) Designation of Items on Appeal, (2) Statement of Issues and (3) Written Notice a Transcript has been Ordered or a Certificate Stating No Transcript is Being Ordered. (RE: related document(s)333 Notice of Appeal and Statement of Election filed by Creditor Mission Product Holdings, Inc.). (jtp) (Entered: 12/29/2015)
12/31/2015	338 (3 pgs)	BNC Certificate of Notice. (RE: related document(s) 337 Notice to Appellant re: Appeal). No. of Notices: 11. Notice Date 12/31/2015. (Admin.) (Entered: 01/01/2016)
01/04/2016	339	Notice of Docketing Record on Appeal to BAP. Case Number Assigned: NH 15-0069 (RE: related document(s)333 Notice of Appeal and Statement of Election filed by Creditor Mission Product Holdings, Inc.). (jtp) (Entered: 01/04/2016)
01/04/2016	340 (3 pgs)	Appellant Designation of Contents For Inclusion in Record On Appeal Filed by Creditor Mission Product Holdings, Inc. (RE: related document(s) 333 Notice of Appeal and Statement of Election filed by Creditor Mission Product

Holdings, Inc.) Appellee designation due by 01/19/2016. Transmission of Designation due by 02/3/2016. (Klass, Michael) (Entered: 01/04/2016)

01/04/2016	341 (3 pgs)	Statement of Issues on Appeal Filed by Creditor Mission Product Holdings, Inc. (RE: related document(s) 333 Notice of Appeal and Statement of Election filed by Creditor Mission Product Holdings, Inc.) (Klass, Michael) (Entered: 01/04/2016)
01/04/2016	342 (3 pgs)	Appellant Designation of Contents For Inclusion in Record On Appeal Filed by Creditor Mission Product Holdings, Inc. (RE: related document(s) 333 Notice of Appeal and Statement of Election filed by Creditor Mission Product Holdings, Inc., 340 Appellant Designation filed by Creditor Mission Product Holdings, Inc.) Appellee designation due by 01/19/2016. Transmission of Designation due by 02/3/2016. (Klass, Michael) (Entered: 01/04/2016)
01/04/2016	343 (2 pgs)	Transcript Order placed for Hearing(s) held on 10/2/15, 11/18/15 and 11/23/15 as included in the Designation of Record on

		Appeal. Filed by Creditor Mission Product Holdings, Inc. (RE: related document(s) 333 Notice of Appeal and Statement of Election filed by Creditor Mission Product Holdings, Inc.) (Klass, Michael) (Entered: 01/04/2016)
01/04/2016	344 (2 pgs)	Certificate of Service Filed by Creditor Mission Product Holdings, Inc. (RE: related document(s) 341Statement of Issues on Appeal filed by Creditor Mission Product Holdings, Inc., 342 Appellant Designation filed by Creditor Mission Product Holdings, Inc., 343 Transcript Ordered re: Appeal filed by Creditor Mission Product Holdings, Inc.) (Klass, Michael) (Entered: 01/04/2016)
01/04/2016	345 (2 pgs)	Notice of Withdrawal of Document. Filed by Creditor Mission Product Holdings, Inc. (RE: related document(s) 340 Appellant Designation filed by Creditor Mission Product Holdings, Inc.) (Klass, Michael) (Entered: 01/04/2016)
01/05/2016	346 (38 pgs; 8 docs)	Application to Employ of DS Feller Company, LLC as Chief Liquidation Officer Filed by

		Debtor Old Cold, LLC Hearing scheduled for 2/2/2016 at 01:30 PM at Courtroom 2, 1000 Elm Street, 11th Floor, Manchester, NH. (Attachments: # 1 Proposed Order Exhibit A # 2 Exhibit 1 To Proposed Order - Consulting Agreement # 3 Exhibit B - Consulting Agreement # 4 Declaration of David S. Feller # 5 Exhibit A to Declaration of David S. Feller - Consulting Agreement # 6 Exhibit B to Declaration of David S. Feller - Resume of David S. Feller # 7 Exhibit C to Declaration of David S. Feller - Short Biography of David S. Feller) (Sklar, Daniel) (Entered: 01/05/2016)
01/06/2016	347 (4 pgs)	Notice of Hearing Filed by Debtor Old Cold, LLC (RE: related document(s) 346 Application to Employ filed by Debtor Old Cold, LLC) Hearing scheduled for 2/2/2016 at 01:30 PM at Courtroom 2, 1000 Elm Street, 11th Floor, Manchester, NH. (Sklar, Daniel) (Entered: 01/06/2016)
01/06/2016	348 (33 pgs; 4 docs)	Adversary case 16-01001. Complaint *of the Debtor and Schleicher & Stebbins Hotels L.L.C. Seeking Extension of Automatic*

		Stay Under 11 U.S.C. Section 362(a) and for Injunctive Relief Pursuant to 11 U.S.C. Section 105(a) by Old Cold, LLC, Schleicher & Stebbins Hotels, L.L.C. against Mission Product Holdings, Inc.. Fee Amount $ 350. (Attachments: # 1 Exhibit A # 2 Exhibit B # 3 Adversary Proceeding Cover Sheet) (71 (Injunctive relief - imposition of stay)) (Candon, Christopher) Modified on 1/7/2016 to correct party filer(jtp). (Entered: 01/06/2016)
01/12/2016	349 (1 pg)	Order Granting Application For Interim Fees (Related Doc # 299) Granting for Nixon Peabody LLP, fees awarded: $223775.50, expenses awarded: $11821.20 Signed on 1/12/2016. (jtp) (Entered: 01/12/2016)
01/12/2016	350 (9 pgs)	Amended Certificate of Service Filed by Debtor Old Cold, LLC (RE: related document(s) 299 Application for Interim Fees filed by Debtor's Attorney Nixon Peabody LLP) (Sklar, Daniel) (Entered: 01/12/2016)
01/12/2016	351 (25 pgs)	Response Filed by Creditor Mission Product Holdings, Inc. (RE: related docu-

		ment(s) 313 Objection to Claim(s) filed by Debtor Old Cold, LLC) (Klass, Michael) (Entered: 01/12/2016)
01/14/2016	352 (6 pgs; 2 docs)	Assented Motion to Appear Telephonically at the hearing scheduled for January 19, 2016 Filed by Debtor Old Cold, LLC (Attachments: # 1 Proposed Order) (Sklar, Daniel) (Entered: 01/14/2016)
01/14/2016	353 (3 pgs)	BNC Certificate of Notice - PDF Document. (RE: related document(s) 349 Order on Application for Interim Fees). No. of Notices: 11. Notice Date 01/14/2016. (Admin.) (Entered: 01/15/2016)
01/15/2016	354 (1 pg)	Order Granting Motion to Appear Telephonically at the hearing scheduled for January 19, 2016 (Related Doc # 352) Signed on 1/15/2016. (jtp) (Entered: 01/15/2016)
01/15/2016	355 (5 pgs)	Appellee Designation of Contents for Inclusion in Record of Appeal Filed by Creditor Schleicher & Stebbins Hotels, L.L.C. (RE: related document(s) 242 Notice of Appeal and Statement of Election filed by Creditor Mission Product

		Holdings, Inc., 342 Appellant Designation filed by Creditor Mission Product Holdings, Inc.) (Candon, Christopher) (Entered: 01/15/2016)
01/15/2016	356 (2 pgs)	Transcript Order placed for Hearing(s) held on 9/18/2015,11/3/2015 as included in the Designation of Record on Appeal. Filed by Creditor Schleicher & Stebbins Hotels, L.L.C. (RE: related document(s) 242 Notice of Appeal and Statement of Election filed by Creditor Mission Product Holdings, Inc.) (Candon, Christopher) (Entered: 01/15/2016)
01/17/2016	357 (3 pgs)	BNC Certificate of Notice - PDF Document. (RE: related document(s) 354 Order on Motion to Appear Telephonically or Retain Electronic Device). No. of Notices: 11. Notice Date 01/17/2016. (Admin.) (Entered: 01/18/2016)
01/19/2016	358 (2 pgs)	Order Granting Application For Final Fees (Related Doc # 321) Granting for Phoenix Capital Resources, fees awarded: $145350.00, expenses awarded: $7203.30 Signed on 1/19/2016. (jtp) (Entered: 01/19/2016)

01/19/2016	359 (2 pgs)	Acknowledgement of Request for Transcript of Testimony. Request was received by the Transcription Service on 1/19/2016. The Reporter Ruth Ann Hager of Cascade Hills Transcription, Inc. expects to have the transcript completed by 1/26/2016 (RE: related document(s)356 Transcript Ordered re: Appeal filed by Creditor Schleicher & Stebbins Hotels, L.L.C.). (gll) (Entered: 01/19/2016)
01/20/2016	360 (2 pgs)	Procedural Order Signed on 1/20/2016 (RE: related document(s) 313 Objection to Claim(s) filed by Debtor Old Cold, LLC) Final Pre-Trial Conference set for 4/12/2016 at 02:00 PM at Courtroom 2, 1000 Elm Street, 11th Floor, Manchester, NH. Discovery shall be completed by no later than March 15, 2016. (jtp) (Entered: 01/20/2016)
01/21/2016	361 (4 pgs)	BNC Certificate of Notice - PDF Document. (RE: related document(s) 358 Order on Application for Final Fees). No. of Notices: 11. Notice Date 01/21/2016. (Admin.) (Entered: 01/22/2016)
01/22/2016	362	BNC Certificate of Notice - PDF

	(4 pgs)	Document. (RE: related document(s) 360 Order to Continue/Schedule Hearing). No. of Notices: 11. Notice Date 01/22/2016. (Admin.) (Entered: 01/23/2016)
01/26/2016	363 (21 pgs)	Debtor-In-Possession Monthly Operating Report for Reporting Period December 31, 2015 Filed by Debtor Old Cold, LLC (Sklar, Daniel) (Entered: 01/26/2016)
01/26/2016	364 (6 pgs)	Objection Filed by U.S. Trustee Office of the U.S. Trustee (RE: related document(s) 346 Application to Employ filed by Debtor Old Cold, LLC) (Dirsa, Ann) (Entered: 01/26/2016)
01/29/2016	366 (961 pgs; 5 docs)	Transmittal of Record on Appeal to BAP (RE: related document(s)333 Notice of Appeal and Statement of Election filed by Creditor Mission Product Holdings, Inc.). (Attachments: # 1 Appellant Part 1 of 4 # 2Appellant part 2 of 4 # 3 Appellant part 3 of 4 # 4 Appellant part 4 of 4) (jtp) (Entered: 01/29/2016)
01/29/2016	367 (407 pgs;	Transmittal of Record on Appeal to BAP (RE: related docu-

	4 docs)	ment(s)333 Notice of Appeal and Statement of Election filed by Creditor Mission Product Holdings, Inc.). (Attachments: # 1 Appellee part 1 of 12 # 2Appellee part 2 of 12 # 3 Appellee part 3 of 12) (jtp) (Entered: 01/29/2016)
01/29/2016	368 (368 pgs; 4 docs)	Transmittal of Record on Appeal to BAP (RE: related document(s)333 Notice of Appeal and Statement of Election filed by Creditor Mission Product Holdings, Inc.). (Attachments: # 1 Appellee Part 4 of 12 # 2Appellee part 5 of 12 # 3 Appellee part 6 of 12) (jtp) (Entered: 01/29/2016)
01/29/2016	369 (132 pgs; 4 docs)	Transmittal of Record on Appeal to BAP (RE: related document(s)333 Notice of Appeal and Statement of Election filed by Creditor Mission Product Holdings, Inc.). (Attachments: # 1 part 7 of 12 # 2 appellee part 8 of 12 # 3 Appellee part 9 of 12) (jtp) (Entered: 01/29/2016)
01/29/2016	370 (309 pgs; 3 docs)	Transmittal of Record on Appeal to BAP (RE: related document(s)333 Notice of Appeal and Statement of Election filed by

		Creditor Mission Product Holdings, Inc.). (Attachments: # 1 Appellee part 10 of 12 # 2Appellee part 11 of 12) (jtp) (Entered: 01/29/2016)
01/29/2016	371 (167 pgs; 2 docs)	Transmittal of Record on Appeal to BAP (RE: related document(s)333 Notice of Appeal and Statement of Election filed by Creditor Mission Product Holdings, Inc.). (Attachments: # 1 Appellee part 12 of 12) (jtp) (Entered: 01/29/2016)
01/29/2016	372	Order Striking Transmittal of Record on Appeal to BAP (Court Doc. No. 365). The document was filed into the incorrect case. Signed on 1/29/2016 /s/ Judge J.Michael Deasy (RE: related document(s) 365 Transmittal of Record on Appeal) (jtp) (Entered: 01/29/2016)
02/01/2016	373 (4 pgs)	Proposed Order *Stipulated Order Concerning Stay of Certain Matters* Filed by Creditor Schleicher & Stebbins Hotels, L.L.C. (RE: related document(s) 313 Objection to Claim(s) filed by Debtor Old Cold, LLC) (Candon, Christopher) (Entered: 02/01/2016)

02/02/2016	374 (1 pg)	AMENDED Transmittal of Record on Appeal to BAP (RE: related document(s)333 Notice of Appeal and Statement of Election filed by Creditor Mission Product Holdings, Inc.). (jtp) (Entered: 02/02/2016)
02/02/2016		Hearing Held on 2/2/2016. Parties to File Proposed Order on or before 2/9/16 (RE: related document(s)346Application to Employ of DS Feller Company, LLC as Chief Liquidation Officer Filed by Debtor Old Cold, LLC Proposed Order due on or before 2/9/2016. (mbs) (Entered: 02/02/2016)
02/03/2016	375 (2 pgs)	Stipulated Order Concerning Stay of Certain Matters Signed on 2/3/2016 (RE: related document(s) 313Objection to Claim(s) filed by Debtor Old Cold, LLC) (jtp) (Entered: 02/03/2016)
02/05/2016	376 (4 pgs)	BNC Certificate of Notice - PDF Document. (RE: related document(s) 375 Order). No. of Notices: 11. Notice Date 02/05/2016. (Admin.) (Entered: 02/06/2016)
02/09/2016	377 (9 pgs; 2 docs)	Proposed Order Filed by Debtor Old Cold, LLC (RE: related document(s) 346 Application to Em-

		ploy filed by Debtor Old Cold, LLC) (Attachments: # 1 Exhibit 1 - Consulting Agreement) (Sklar, Daniel) (Entered: 02/09/2016)
02/12/2016	378 (4 pgs)	Order Granting Application to Employ DS Feller Company, LLC as Cheif Liquidation Officer for the Debtor (Related Doc # 346) Signed on 2/12/2016. (jtp) (Entered: 02/16/2016)
02/17/2016	379 (18 pgs; 3 docs)	Second Motion to Extend Exclusivity Period for Filing a Chapter 11 Plan *and Solicit Acceptances Thereof* Filed by Debtor Old Cold, LLC Hearing scheduled for 2/23/2016 at 11:00 AM at Courtroom 2, 1000 Elm Street, 11th Floor, Manchester, NH. (Attachments: # 1 Proposed Order Exhibit A # 2 Notice of Hearing) (Sklar, Daniel) Modified on 2/18/2016 to correct text (jtp). (Entered: 02/17/2016)
02/17/2016	380 (7 pgs; 2 docs)	Motion to Expedite Hearing Filed by Debtor Old Cold, LLC (RE: related document(s) 379 Motion to Extend/Limit Exclusivity Period filed by Debtor Old Cold, LLC) (Attachments: # 1 Proposed Order Exhibit A) (Sklar, Daniel)

(Entered: 02/17/2016)

02/18/2016	381 (16 pgs)	Debtor-In-Possession Monthly Operating Report for Reporting Period January 31, 2016 Filed by Debtor Old Cold, LLC (Sklar, Daniel) (Entered: 02/18/2016)
02/18/2016	382 (1 pg)	Order Granting Motion to Expedite Hearing on Second Motion to Extend Exclusivity Period for Filing a Chapter 11 Plan and Solicit Acceptances Thereof (related document(s): 379 Motion to Extend/Limit Exclusivity Period filed by Debtor Old Cold, LLC, 380 Motion to Expedite Hearing filed by Debtor Old Cold, LLC) Signed on 2/18/2016. Hearing scheduled for 2/23/2016 at 11:00 AM at Courtroom 2, 1000 Elm Street, 11th Floor, Manchester, NH. (jtp) (Entered: 02/18/2016)
02/18/2016		Objection/Response Deadline Updated (RE: related document(s)379 Motion to Extend/Limit Exclusivity Period filed by Debtor Old Cold, LLC). Objections due by4:00 pm on 2/22/2016. (jtp) (Entered: 02/18/2016)

02/18/2016	383 (6 pgs)	BNC Certificate of Notice - PDF Document. (RE: related document(s) 378 Order on Application to Employ). No. of Notices: 12. Notice Date 02/18/2016. (Admin.) (Entered: 02/19/2016)
02/23/2016	384 (2 pgs)	Order Granting Motion to Extend Exclusivity Period for Filing a Chapter 11 Plan and Solicit Acceptances Thereof (related document(s): 316 Order on Motion to Extend/Limit Exclusivity Period, 379 Motion to Extend/Limit Exclusivity Period filed by Debtor Old Cold, LLC) Signed on 2/23/2016. Chapter 11 Plan due by 6/27/2016. The Debtors Soliciation Period is extended through and including August 26, 2016. (jtp) (Entered: 02/23/2016)
02/25/2016	385 (19 pgs; 3 docs)	Motion *For Comfort Order Pursuant To Bankruptcy Code Section 105(A) And 363(C) Or In the Alternative*, Motion For Sale of Property under Section 363(b) Filed by Debtor Old Cold, LLC Hearing scheduled for 3/22/2016 at 11:00 AM at Courtroom 2, 1000 Elm Street, 11th Floor, Manchester, NH. (Attachments: # 1Proposed Order Exhibit A # 2 Notice of Hearing)

		(Sklar, Daniel) (Entered: 02/25/2016)
02/25/2016	386 (7 pgs)	BNC Certificate of Notice - PDF Document. (RE: related document(s) 384 Order on Motion to Extend/Limit Exclusivity Period). No. of Notices: 164. Notice Date 02/25/2016. (Admin.) (Entered: 02/26/2016)
03/15/2016	387 (8 pgs)	Objection - *Mission Product Holdings, Inc.'s Objection to Debtor's Motion for Comfort Order Pursuant to Bankruptcy Code Section 105(a) and 363(b) or in the Alternative to Sell Inventory Pursuant to Bankruptcy Code Section 363(b)* Filed by Creditor Mission Product Holdings, Inc. (RE: related document(s) 385 Motion filed by Debtor Old Cold, LLC, Motion for Sale of Property under Section 363(b)) (Klass, Michael) (Entered: 03/15/2016)
03/16/2016	388 (15 pgs)	Debtor-In-Possession Monthly Operating Report for Reporting Period February 29, 2016 Filed by Debtor Old Cold, LLC (Sklar, Daniel) (Entered: 03/16/2016)
03/21/2016	389	Reply *to Mission Product Hold-*

	(9 pgs; 2 docs)	*ings, Inc.'s Objection to Motion for Comfort Order Pursuant to Bankrptcy Code Section 105(A) and 363(C) Or In The Alternative To Sell Inventory Pursuant to Bankruptcy Code Section 363(B)* Filed by Debtor Old Cold, LLC (RE: related document(s) 385 Motion filed by Debtor Old Cold, LLC, Motion for Sale of Property under Section 363(b), 387 Objection filed by Creditor Mission Product Holdings, Inc.) (Attachments: # 1 Exhibit A - Schedule of Proposed Categories of Inventory) (Sklar, Daniel) (Entered: 03/21/2016)
03/22/2016	390 (2 pgs)	Statement of Payments to Ordinary Course Professionals Filed by Debtor Old Cold, LLC (Sklar, Daniel) (Entered: 03/22/2016)
03/22/2016	391 (1 pg)	Order Directing Debtor Old Cold LLC to File Proposed Order on or before 3/29/16. Signed on 3/22/2016 (RE: related document(s) 385 Motion filed by Debtor Old Cold, LLC, Motion for Sale of Property under Section 363(b)) Proposed Order due on or before 3/29/2016. (jtp) (Entered: 03/22/2016)

03/24/2016	392 (3 pgs)	BNC Certificate of Notice - PDF Document. (RE: related document(s) 391 Order Directing). No. of Notices: 11. Notice Date 03/24/2016. (Admin.) (Entered: 03/25/2016)
03/28/2016	393 (3 pgs; 2 docs)	Proposed Order *Approving the Debtor's Sale of Inventory Pursuant to Bankruptcy Code Section 363(B)* Filed by Debtor Old Cold, LLC (RE: related document(s) 385 Motion filed by Debtor Old Cold, LLC, Motion for Sale of Property under Section 363(b), 387 Objection filed by Creditor Mission Product Holdings, Inc., 389Reply filed by Debtor Old Cold, LLC) (Attachments: # 1 Exhibit A - List of Inventory) (Sklar, Daniel) (Entered: 03/28/2016)
03/30/2016	394 (3 pgs)	Order Granting Motion For Sale of Property under Section 363(b) (Related Doc # 385) Signed on 3/30/2016. (jtp) (Entered: 03/30/2016)
04/01/2016	395 (5 pgs)	BNC Certificate of Notice - PDF Document. (RE: related document(s) 394 Order on Motion for Sale of Property under Section 363(b)). No. of Notices: 12. Notice

		Date 04/01/2016. (Admin.) (Entered: 04/02/2016)
04/14/2016	396 (15 pgs)	Debtor-In-Possession Monthly Operating Report for Reporting Period March 31, 2016 Filed by Debtor Old Cold, LLC (Sklar, Daniel) (Entered: 04/14/2016)
04/19/2016	397 (15 pgs)	Amended Debtor-In-Possession Monthly Operating Report for Reporting Period March 31, 2016 Filed by Debtor Old Cold, LLC (Sklar, Daniel) (Entered: 04/19/2016)
05/03/2016	398 (2 pgs)	Statement of Payments to Ordinary Course Professionals Filed by Debtor Old Cold, LLC (Sklar, Daniel) (Entered: 05/03/2016)
05/10/2016	399 (15 pgs)	Debtor-In-Possession Monthly Operating Report for Reporting Period April 30, 2016 Filed by Debtor Old Cold, LLC (Sklar, Daniel) (Entered: 05/10/2016)
06/01/2016	400 (48 pgs; 6 docs)	Second Application for Interim Fees for Nixon Peabody LLP, Debtor's Attorney, Period: 12/1/2015 to 4/30/2016, Fee: $156,175.00, Expenses: $5,380.35.Filed by Debtor's Attorney Nixon Peabody LLP

		Hearing scheduled for 6/28/2016 at 11:00 AM at Courtroom 2, 1000 Elm Street, 11th Floor, Manchester, NH. (Attachments: # 1 Exhibit A - Nixon Peabody Invoice - Bankruptcy Matter # 2 Exhibit B - Nixon Peabody Invoice Regarding Appeals and Adversary Proceedings # 3 Fee Annex - Interim Request Exhibit C # 4Proposed Order Exhibit D # 5 Notice of Hearing) (Sklar, Daniel) (Entered: 06/01/2016)
06/09/2016	401 (23 pgs; 5 docs)	First Application for Interim Fees for DS Feller Company, LLC, Other Professional, Period: 1/6/2016 to 4/30/2016, Fee: $12,150.00, Expenses: $420.39.Filed by Other Professional DS Feller Company, LLC Hearing scheduled for 6/28/2016 at 11:00 AM at Courtroom 2, 1000 Elm Street, 11th Floor, Manchester, NH. (Attachments: # 1 Exhibit A - DS Feller Company, LLC Invoice # 2 Fee Annex - Interim Request Exhibit B # 3 Proposed Order Exhibit C # 4 Notice of Hearing) (Sklar, Daniel) (Entered: 06/09/2016)
06/10/2016	402 (15 pgs)	Debtor-In-Possession Monthly Operating Report for Reporting

		Period May 31, 2016 Filed by Debtor Old Cold, LLC (Sklar, Daniel) (Entered: 06/10/2016)
06/13/2016	403 (14 pgs; 2 docs)	Second Motion to Extend Exclusivity Period for Filing a Chapter 11 Plan and Solicit Acceptances Thereof Filed by Debtor Old Cold, LLC Hearing scheduled for 7/12/2016 at 11:00 AM at Courtroom 2, 1000 Elm Street, 11th Floor, Manchester, NH. (Attachments: # 1 Proposed Order) (Sklar, Daniel) Modified on 6/13/2016 to correct text(jtp). (Entered: 06/13/2016)
06/13/2016	404 (2 pgs)	Notice of Hearing *Regarding Debtor's Second Motion for Order Extending Exclusive Periods to File Chapter 11 Plan and Solicit Acceptances Thereof* Filed by Debtor Old Cold, LLC (RE: related document(s) 403Motion to Extend/Limit Exclusivity Period filed by Debtor Old Cold, LLC) (Sklar, Daniel) (Entered: 06/13/2016)
06/28/2016	405 (1 pg)	Order Granting Application For Interim Fees (Related Doc # 401) Granting for DS Feller Company, LLC, fees awarded: $12150.00, expenses awarded: $420.39

		Signed on 6/28/2016. (jtp) (Entered: 06/28/2016)
06/28/2016	406 (1 pg)	Order Granting Application For Interim Fees (Related Doc # 400) Granting for Nixon Peabody LLP, fees awarded: $156175.00, expenses awarded: $5380.35 Signed on 6/28/2016. (jtp) (Entered: 06/28/2016)
06/30/2016	407 (3 pgs)	BNC Certificate of Notice - PDF Document. (RE: related document(s) 405 Order on Application for Interim Fees). No. of Notices: 12. Notice Date 06/30/2016. (Admin.) (Entered: 07/01/2016)
06/30/2016	408 (3 pgs)	BNC Certificate of Notice - PDF Document. (RE: related document(s) 406 Order on Application for Interim Fees). No. of Notices: 12. Notice Date 06/30/2016. (Admin.) (Entered: 07/01/2016)
07/12/2016	409 (2 pgs)	Order Granting Motion to Extend/Limit Exclusivity Period for Filing a Chapter 11 Plan and Solicit Acceptances Thereof (related document(s): 384 Order on Motion to Extend/Limit Exclusivity Period, 403Motion to Extend/Limit Exclusivity Period filed by Debtor Old Cold, LLC) Signed on

		7/12/2016. Chapter 11 Plan due by 10/25/2016. (jtp) (Entered: 07/12/2016)
07/14/2016	410 (7 pgs)	BNC Certificate of Notice - PDF Document. (RE: related document(s) 409 Order on Motion to Extend/Limit Exclusivity Period). No. of Notices: 165. Notice Date 07/14/2016. (Admin.) (Entered: 07/15/2016)
08/03/2016	411 (16 pgs)	Debtor-In-Possession Monthly Operating Report for Reporting Period June 30, 2016 Filed by Debtor Old Cold, LLC (Sklar, Daniel) (Entered: 08/03/2016)
08/30/2016	412 (14 pgs)	Debtor-In-Possession Monthly Operating Report for Reporting Period July 31, 2016 Filed by Debtor Old Cold, LLC (Sklar, Daniel) (Entered: 08/30/2016)
09/02/2016	413 (26 pgs; 5 docs)	First Application for Interim Fees for Baker Newman Noyes, LLC, Accountant, Period: 4/20/2016 to 8/31/2016, Fee: $30,611.00, Expenses: $290.00.Filed by Accountant Baker Newman Noyes Hearing scheduled for 10/4/2016 at 11:00 AM at Courtroom 2, 1000 Elm Street, 11th Floor, Manchester,

		NH. (Attachments: # 1 Exhibit A - Invoices of Baker Newman & Noyes, LLC # 2 Fee Annex - Interim Request Exhibit B # 3 Proposed Order Exhibit C # 4 Notice of Hearing) (Sklar, Daniel) Modified on 9/2/2016 to correct location (dcs). Modified on 10/4/2016 to correct party(jtp). (Entered: 09/02/2016)
09/20/2016	414 (14 pgs)	Debtor-In-Possession Monthly Operating Report for Reporting Period August 31, 2016 Filed by Debtor Old Cold, LLC (Sklar, Daniel) (Entered: 09/20/2016)
09/21/2016	415 (14 pgs)	Amended Debtor-In-Possession Monthly Operating Report for Reporting Period August 31, 2016 Filed by Debtor Old Cold, LLC (Sklar, Daniel) (Entered: 09/21/2016)
10/04/2016	416 (1 pg)	Order Granting Application For Interim Fees (Related Doc # 413) Granting for Baker Newman Noyes, LLC, fees awarded: $30611.00, expenses awarded: $290.00 Signed on 10/4/2016. (jtp) (Entered: 10/04/2016)
10/05/2016	417 (19 pgs;	Debtor's (A) Motion for Entry of an Ex Parte Bridge Order and

	4 docs)	(B) Fourth Motion under Bankruptcy Code Section 1121(d) for order Extending Exclusive Periods to file Chapter 11 Plan and Solcit Acceptances Thereof Filed by Debtor Old Cold, LLC Hearing scheduled for 11/1/2016 at 11:00 AM at Courtroom 2, 1000 Elm Street, 11th Floor, Manchester, NH. (Attachments: # 1 Proposed Order Exhibit A # 2 Proposed Order Exhibit B # 3 Notice of Hearing) (Sklar, Daniel) Modified on 10/6/2016 to correct text (jtp). (Entered: 10/05/2016)
10/06/2016	418 (3 pgs)	BNC Certificate of Notice - PDF Document. (RE: related document(s) 416 Order on Application for Interim Fees). No. of Notices: 12. Notice Date 10/06/2016. (Admin.) (Entered: 10/07/2016)
10/12/2016	419 (15 pgs)	Debtor-In-Possession Monthly Operating Report for Reporting Period September 30, 2016 Filed by Debtor Old Cold, LLC (Sklar, Daniel) (Entered: 10/12/2016)
10/24/2016	420 (2 pgs)	Order; The Debtor's Exclusive Filing period is hereby extended until such time as the Court has entered a final order Determining

		the Motion Signed on 10/24/2016 (RE: related document(s) 417 Debtor's (A) Motion for Entry of an Ex Parte Bridge Order and (B) Fourth Motion under Bankruptcy Code Section 1121(d) for order Extending Exclusive Periods to file Chapter 11 Plan and Solcit Acceptances Thereof filed by Debtor Old Cold, LLC) (jtp) (Entered: 10/24/2016)
10/25/2016	421 (37 pgs; 2 docs)	Final Order By Bankruptcy Appellate Panel Re: Appeal Assigned BAP Case Number: BAP NO. NH15-069, Affirming the bankruptcy court's December 18, 2015 order approving the sale of assets Signed on 10/25/2016 (RE: related document(s) 333 Notice of Appeal and Statement of Election filed by Creditor Mission Product Holdings, Inc.) (Attachments: # 1 Judgment) (jtp) (Entered: 10/26/2016)
10/26/2016	422 (4 pgs)	BNC Certificate of Notice - PDF Document. (RE: related document(s) 420 Order). No. of Notices: 12. Notice Date 10/26/2016. (Admin.) (Entered: 10/27/2016)
10/28/2016	423 (42 pgs;	Notice received from BAP re: Final Order by Bankruptcy Appel-

	2 docs)	late Panel Bankruptcy Court order. An Appeal to the First Circuit Court of Appeals was filed 10/28/16. (RE: related document(s)421 Order Bankruptcy Appellate Panel re: Appeal). (Attachments: # 1 Appellant's Notice of Appeal) (jtp) (Entered: 10/31/2016)
11/01/2016	424 (2 pgs)	Order Granting Debtor's Exclusive Periods to File Chapter 11 Plan and Solicit Acceptance Thereof (related document(s): 417 Motion to Extend/Limit Exclusivity Period filed by Debtor Old Cold, LLC) Signed on 11/1/2016. Chapter 11 Plan due by 3/1/2017. (jtp) (Entered: 11/01/2016)
11/03/2016	425	Notice of Docketing Record on Appeal to Court of Appeals. Case Number Assigned: 16-9012 (RE: related document(s)333 Notice of Appeal and Statement of Election filed by Creditor Mission Product Holdings, Inc.). (jtp) (Entered: 11/03/2016)
11/03/2016	426 (7 pgs)	BNC Certificate of Notice - PDF Document. (RE: related document(s) 424 Order on Motion to Extend/Limit Exclusivity Peri-

		od). No. of Notices: 164. Notice Date 11/03/2016. (Admin.) (Entered: 11/04/2016)
11/16/2016	427 (80 pgs; 2 docs)	Notice received from BAP re: Final Order by Bankruptcy Appellate Panel Bankruptcy Court order. An Cross-Appeal to the First Circuit Court of Appeals was filed 11/16/16. (RE: related document(s)421 Order Bankruptcy Appellate Panel re: Appeal). (Attachments: # 1 Appellees' Notice of Cross-Appeal) (jtp) (Entered: 11/17/2016)
11/17/2016	428	Notice of Docketing Record on Cross-Appeal to Court of Appeals. Case Number Assigned: 16-9015 for Cross-Appeal (RE: related document(s)333 Notice of Appeal and Statement of Election filed by Creditor Mission Product Holdings, Inc.). (jtp) (Entered: 11/17/2016)
11/18/2016	429 (29 pgs; 2 docs)	Final Order By Bankruptcy Appellate Panel Re: Appeal Assigned BAP Case Number: 15-0065, Affirm in Part and Reverse in Part Signed on 11/18/2016 (RE: related document(s) 242 Notice of Appeal and Statement of Election filed by Creditor Mission Product

		Holdings, Inc.) (Attachments: # 1 Judgment) (jtp) (Entered: 11/21/2016)
11/23/2016	430 (34 pgs; 2 docs)	Notice received from BAP re: Final Order by Bankruptcy Appellate Panel Affirm in Part and Reverse in Part Bankruptcy Court order. An Appeal to the First Circuit Court of Appeals was filed 11/22/16. (RE: related document(s)429 Order Bankruptcy Appellate Panel re: Appeal). (Attachments: # 1 Appellant's Notice of Appeal) (jtp) (Entered: 11/23/2016)
11/29/2016	432	Order Striking Withdrawal (Court Doc. No. 431). The document was filed into the incorrect case. Signed on 11/29/2016 /s/ Judge J. Michael Deasy (RE: related document(s) 431 Motion to Withdraw as Attorney filed by Creditor Cool Canuck Corp.) (dcs) (Entered: 11/29/2016)
11/29/2016	433 (2 pgs)	Notice of Withdrawal as Attorney by Steven J. Venezia Filed by Creditor Cool Canuck Corp. Party has until 12/20/2016 to respond to the Court's Mailing of the Notice of Entry of Withdrawal. (Venezia, Steven) (Entered:

11/29/2016)

11/29/2016	434 (16 pgs)	Debtor-In-Possession Monthly Operating Report for Reporting Period October 31, 2016 Filed by Debtor Old Cold, LLC (Sklar, Daniel) (Entered: 11/29/2016)
11/30/2016	435	Notice of Docketing Record on Appeal to First Circuit Court of Appeals. Case Number Assigned: 16-9016; BAP No. 15-0065; BK No. 15-11400 (RE: related document(s) 242 Notice of Appeal and Statement of Election filed by Creditor Mission Product Holdings, Inc.). (dcs) (Entered: 11/30/2016)
12/23/2016	436 (51 pgs; 6 docs)	Third Application for Interim Fees for Nixon Peabody LLP, Debtor's Attorney, Period: 5/1/2016 to 11/30/2016, Fee: $83,870.50, Expenses: $4,261.36.Filed by Debtor's Attorney Nixon Peabody LLP Hearing scheduled for 1/24/2017 at 11:00 AM at Courtroom 2, 1000 Elm Street, 11th Floor, Manchester, NH. (Attachments: # 1 Exhibit A - Bankruptcy Invoices # 2 Exhibit B - Appeal Invoices # 3 Fee Annex - Interim Request Exhibit C # 4 Proposed

		Order Exhibit D #5 Notice of Hearing) (Sklar, Daniel) (Entered: 12/23/2016)
12/23/2016	437 (23 pgs; 5 docs)	Second Application for Interim Fees for DS Feller Company, LLC, Other Professional, Period: 5/6/2016 to 11/30/2016, Fee: $3,600.00, Expenses: $0.00.Filed by Other Professional DS Feller Company, LLC Hearing scheduled for 1/24/2017 at 11:00 AM at Courtroom 2, 1000 Elm Street, 11th Floor, Manchester, NH. (Attachments: #1 Exhibit A - Invoice #2 Fee Annex - Interim Request Exhibit B #3 Proposed Order Exhibit C #4 Notice of Hearing) (Sklar, Daniel) Modified on 12/27/2016 to correct date (dcs). (Entered: 12/23/2016)
12/27/2016	438 (1 pg)	Exhibit *C - Amended - Fee Annex* Filed by Debtor's Attorney Nixon Peabody LLP (RE: related document(s) 436 Application for Interim Fees filed by Debtor's Attorney Nixon Peabody LLP) (Sklar, Daniel) (Entered: 12/27/2016)
12/27/2016	439 (1 pg)	Exhibit *B - Amended - Fee Annex* Filed by Other Professional DS Feller Company, LLC (RE:

		related document(s) 437 Application for Interim Fees filed by Other Professional DS Feller Company, LLC) (Sklar, Daniel) (Entered: 12/27/2016)
01/24/2017	440 (1 pg)	Notice of Rescheduled Hearing (RE: related document(s)436 Application for Interim Fees filed by Debtor's Attorney Nixon Peabody LLP). Hearing scheduled for 1/25/2017 at 11:00 AM at Courtroom 2, 1000 Elm Street, 11th Floor, Manchester, NH. (mbs) (Entered: 01/24/2017)
01/24/2017	441 (1 pg)	Notice of Rescheduled Hearing (RE: related document(s)437 Application for Interim Fees filed by Other Professional DS Feller Company, LLC). Hearing scheduled for 1/25/2017 at 11:00 AM at Courtroom 2, 1000 Elm Street, 11th Floor, Manchester, NH. (mbs) (Entered: 01/24/2017)
01/25/2017	442 (1 pg)	Order Granting Application For Interim Fees (Related Doc # 436) Granting for Nixon Peabody LLP, fees awarded: $83870.50, expenses awarded: $4261.36

		Signed on 1/25/2017. (jtp) (Entered: 01/25/2017)
01/26/2017	443 (1 pg)	Order Granting Application For Interim Fees (Related Doc # 437) Granting for DS Feller Company, LLC, fees awarded: $3600.00, expenses awarded: $0.00 Signed on 1/26/2017. (jtp) (Entered: 01/26/2017)
01/26/2017	444 (6 pgs)	BNC Certificate of Notice. (RE: related document(s) 440 Notice of Rescheduled Hearing). No. of Notices: 166. Notice Date 01/26/2017. (Admin.) (Entered: 01/27/2017)
01/26/2017	445 (6 pgs)	BNC Certificate of Notice. (RE: related document(s) 441 Notice of Rescheduled Hearing). No. of Notices: 166. Notice Date 01/26/2017. (Admin.) (Entered: 01/27/2017)
01/27/2017	446 (3 pgs)	BNC Certificate of Notice - PDF Document. (RE: related document(s) 442 Order on Application for Interim Fees). No. of Notices: 12. Notice Date 01/27/2017. (Admin.) (Entered: 01/28/2017)
01/28/2017	447 (3 pgs)	BNC Certificate of Notice - PDF Document. (RE: related docu-

ment(s) 443 Order on Application for Interim Fees). No. of Notices: 12. Notice Date 01/28/2017. (Admin.) (Entered: 01/29/2017)

01/30/2017	448 (18 pgs)	Debtor-In-Possession Monthly Operating Report for Reporting Period December 31, 2016 Filed by Debtor Old Cold, LLC (Sklar, Daniel) (Entered: 01/30/2017)
02/08/2017	449 (15 pgs)	Debtor-In-Possession Monthly Operating Report for Reporting Period January 31, 2017 Filed by Debtor's Attorney Nixon Peabody LLP (Sklar, Daniel) (Entered: 02/08/2017)
02/15/2017	450 (16 pgs)	Debtor-In-Possession Monthly Operating Report for Reporting Period November 30, 2016 Filed by Debtor's Attorney Nixon Peabody LLP (Sklar, Daniel) (Entered: 02/15/2017)
03/13/2017	451 (13 pgs)	Debtor-In-Possession Monthly Operating Report for Reporting Period February 28, 2017 Filed by Debtor Old Cold, LLC (Sklar, Daniel) (Entered: 03/13/2017)
04/11/2017	452 (13 pgs)	Debtor-In-Possession Monthly Operating Report for Reporting Period March 31, 2017 Filed by

		Debtor Old Cold, LLC (Sklar, Daniel) (Entered: 04/11/2017)
05/10/2017	453 (15 pgs)	Debtor-in-Possession Monthly Operating Report for Reporting Period April 30, 2017 Filed by Debtor Old Cold, LLC (Sklar, Daniel) (Entered: 05/10/2017)
05/26/2017	454 (41 pgs; 2 docs)	The official transcript re: Motion For Comfort Order heard on 3/22/2016 has been filed. Pursuant to Judicial Conference Policy electronic access to transcripts is restricted for 90 days from the date of filing. The transcript release date is 8/24/2017. The transcript is available for review at the Clerk's Office or a copy may be purchased from the transcriber. Parties have until 6/16/2017 to file a Request for Redaction. (RE: related document(s)385 Motion filed by Debtor Old Cold, LLC, Motion for Sale of Property under Section 363(b)). Notice of Intent to Request Redaction Deadline Due by 6/2/2017. Redaction Request Due by 6/16/2017. Redacted Transcript Submission Due by 6/26/2017. Transcript access will be restricted through 8/24/2017. (gll) (Entered: 05/26/2017)

05/26/2017	455 (69 pgs; 2 docs)	The official transcript re: Motion for Determination heard on 11/3/2015 has been filed. Pursuant to Judicial Conference Policy electronic access to transcripts is restricted for 90 days from the date of filing. The transcript release date is 8/24/2017. The transcript is available for review at the Clerk's Office or a copy may be purchased from the transcriber. Parties have until 6/16/2017 to file a Request for Redaction. (RE: related document(s)211 Motion filed by Debtor Old Cold, LLC). Notice of Intent to Request Redaction Deadline Due by 6/2/2017. Redaction Request Due by 6/16/2017. Redacted Transcript Submission Due by 6/26/2017. Transcript access will be restricted through 8/24/2017. (gll) (Entered: 05/26/2017)
05/26/2017	456 (194 pgs; 2 docs)	The official transcript re: Motion for Adequate Protection heard on 11/18/2015 has been filed. Pursuant to Judicial Conference Policy electronic access to transcripts is restricted for 90 days from the date of filing. The transcript release date is 8/24/2017. The transcript is available for review at the Clerk's Office or a copy may

be purchased from the transcriber. Parties have until 6/16/2017 to file a Request for Redaction. (RE: related document(s)14 Motion for Adequate Protection filed by Debtor Old Cold, LLC, Motion to Use Cash Collateral). Notice of Intent to Request Redaction Deadline Due by 6/2/2017. Redaction Request Due by 6/16/2017. Redacted Transcript Submission Due by 6/26/2017. Transcript access will be restricted through 8/24/2017. (gll) (Entered: 05/26/2017)

05/26/2017	457 (199 pgs; 2 docs)	The official transcript re: Motion for Adequate Protection heard on 11/23/2015 has been filed. Pursuant to Judicial Conference Policy electronic access to transcripts is restricted for 90 days from the date of filing. The transcript release date is 8/24/2017. The transcript is available for review at the Clerk's Office or a copy may be purchased from the transcriber. Parties have until 6/16/2017 to file a Request for Redaction. (RE: related document(s)14 Motion for Adequate Protection filed by Debtor Old Cold, LLC, Motion to Use Cash Collateral). Notice of Intent to Request Redaction

Deadline Due by 6/2/2017. Redaction Request Due by 6/16/2017. Redacted Transcript Submission Due by 6/26/2017. Transcript access will be restricted through 8/24/2017. (gll) (Entered: 05/26/2017)

05/26/2017	458 (146 pgs; 2 docs)	The official transcript re: Motion for Adequate Protection,Motion to Approve Procedures and Ex Parte Motion for Christopher M. Desiderio to Appear pro hac vice heard on 10/2/2015 has been filed. Pursuant to Judicial Conference Policy electronic access to transcripts is restricted for 90 days from the date of filing. The transcript release date is 8/24/2017. The transcript is available for review at the Clerk's Office or a copy may be purchased from the transcriber. Parties have until 6/16/2017 to file a Request for Redaction. (RE: related document(s)14 Motion for Adequate Protection filed by Debtor Old Cold, LLC, Motion to Use Cash Collateral, 34 Motion to Approve filed by Debtor Old Cold, LLC, 35 Motion to Assume/Reject filed by Debtor Old Cold, LLC). Notice of Intent to Request Redaction Deadline Due

		by 6/2/2017. Redaction Request Due by 6/16/2017. Redacted Transcript Submission Due by 6/26/2017. Transcript access will be restricted through 8/24/2017. (gll) (Entered: 05/26/2017)
05/26/2017	459 (60 pgs; 2 docs)	The official transcript re: Motion of Debtor for Entry of Interim and Final Orders, Motion OF DEBTOR PURSUANT TO BANKRUPTCY CODE SECTIONS 105(a), 363(b), 503(b), 507(a)(4), AND 507(a)(8) AND BANKRUPTCY RULES 6003 AND 6004, FOR ENTRY OF INTERIM AND FINAL ORDERS, Motion OF DEBTOR PURSUANT TO BANKRUPTCY CODE SECTIONS 105(a) AND 366 (A) APPROVING DEBTORS PROPOSED ADEQUATE ASSURANCE OF PAYMENT TO UTILITY COMPANIES, Motion for Adequate Protection, Motion to Pay, Omnibus Motion to Reject Executory Contracts Nunc Pro Tunc, Motion to Convert Chapter Case to Chapter 7 and Motion to Appoint Trustee, Motion to Appoint Examiner heard on 9/18/2015 has been filed. Pursuant to Judicial Conference

Policy electronic access to transcripts is restricted for 90 days from the date of filing. The transcript release date is 8/24/2017. The transcript is available for review at the Clerk's Office or a copy may be purchased from the transcriber. Parties have until 6/16/2017 to file a Request for Redaction. (RE: related document(s)7 Motion filed by Debtor Old Cold, LLC, 10 Motion filed by Debtor Old Cold, LLC, 11 Motion filed by Debtor Old Cold, LLC, 14 Motion for Adequate Protection filed by Debtor Old Cold, LLC, Motion to Use Cash Collateral, 33 Motion to Pay filed by Debtor Old Cold, LLC, 35 Motion to Assume/Reject filed by Debtor Old Cold, LLC, 107 Motion to Convert to Chapter 7 filed by U.S. Trustee Office of the U.S. Trustee, Motion to Appoint Trustee, Motion to Appoint Examiner, 111 Motion to Appoint Trustee filed by Creditor Mission Product Holdings, Inc., Motion to Appoint Examiner). Notice of Intent to Request Redaction Deadline Due by 6/2/2017. Redaction Request Due by 6/16/2017. Redacted Transcript Submission Due by

		6/26/2017. Transcript access will be restricted through 8/24/2017. (gll) (Entered: 05/26/2017)
05/28/2017	460 (3 pgs)	BNC Certificate of Notice. (RE: related document(s) 454 Transcript). No. of Notices: 1. Notice Date 05/28/2017. (Admin.) (Entered: 05/29/2017)
05/28/2017	461 (3 pgs)	BNC Certificate of Notice. (RE: related document(s) 455 Transcript). No. of Notices: 1. Notice Date 05/28/2017. (Admin.) (Entered: 05/29/2017)
05/28/2017	462 (3 pgs)	BNC Certificate of Notice. (RE: related document(s) 456 Transcript). No. of Notices: 1. Notice Date 05/28/2017. (Admin.) (Entered: 05/29/2017)
05/28/2017	463 (3 pgs)	BNC Certificate of Notice. (RE: related document(s) 457 Transcript). No. of Notices: 1. Notice Date 05/28/2017. (Admin.) (Entered: 05/29/2017)
05/28/2017	464 (3 pgs)	BNC Certificate of Notice. (RE: related docu-

		ment(s) 458 Transcript). No. of Notices: 1. Notice Date 05/28/2017. (Admin.) (Entered: 05/29/2017)
05/28/2017	465 (3 pgs)	BNC Certificate of Notice. (RE: related document(s) 459 Transcript). No. of Notices: 1. Notice Date 05/28/2017. (Admin.) (Entered: 05/29/2017)
06/12/2017	466 (14 pgs)	Debtor-in-Possession Monthly Operating Report for Reporting Period May 31, 2017 Filed by Debtor Old Cold, LLC (Sklar, Daniel) (Entered: 06/12/2017)
06/30/2017	467 (44 pgs; 6 docs)	Fourth Application for Interim Fees for Nixon Peabody LLP, Debtor's Attorney, Period: 12/1/2016 to 5/31/2017, Fee: $62,946.50, Expenses: $1,916.98.Filed by Debtor's Attorney Nixon Peabody LLP Hearing scheduled for 8/8/2017 at 11:00 AM at Courtroom 2, 1000 Elm Street, 11th Floor, Manchester, NH. (Attachments: # 1 Exhibit A - Nixon Peabody Invoices # 2 Exhibit B - Nixon Peabody Invoices Re: Appeals # 3 Fee Annex - Interim Request Exhibit C # 4 Proposed Order

		Exhibit D # 5 Notice of Hearing) (Sklar, Daniel) (Entered: 06/30/2017)
07/06/2017	468 (15 pgs)	Debtor-in-Possession Monthly Operating Report for Reporting Period June 30, 2017 Filed by Debtor Old Cold, LLC (Sklar, Daniel) (Entered: 07/06/2017)
07/06/2017	469 (23 pgs; 5 docs)	Third Application for Interim Fees for DS Feller Company, LLC, Other Professional, Period: 12/1/2016 to 5/31/2017, Fee: $3,900.00, Expenses: $0.00.Filed by Other Professional DS Feller Company, LLC Hearing scheduled for 8/8/2017 at 11:00 AM at Courtroom 2, 1000 Elm Street, 11th Floor, Manchester, NH. (Attachments: # 1 Exhibit A - DS Feller Company Invoice # 2 Fee Annex - Interim Request Exhibit B # 3Proposed Order Exhibit C # 4 Notice of Hearing) (Sklar, Daniel) (Entered: 07/06/2017)
07/11/2017	470 (23 pgs; 5 docs)	Second Application for Interim Fees for Baker Newman Noyes, LLC, Accountant, Period: 1/5/2017 to 6/30/2017, Fee: $4,286.50, Expenses: $200.00.Filed by Accountant Baker Newman Noyes, LLC

		Hearing scheduled for 8/8/2017 at 11:00 AM at Courtroom 2, 1000 Elm Street, 11th Floor, Manchester, NH. (Attachments: # 1 Exhibit A - Baker Newman & Noyes, LLC Invoices # 2 Fee Annex - Interim Request Exhibit B # 3 Proposed Order Exhibit C # 4 Notice of Hearing) (Sklar, Daniel) (Entered: 07/11/2017)
08/08/2017	471 (1 pg)	Order Granting Application For Interim Fees (Related Doc # 467) Granting for Nixon Peabody LLP, fees awarded: $62946.50, expenses awarded: $1916.98 Signed on 8/8/2017. (jtp) (Entered: 08/08/2017)
08/08/2017	472 (1 pg)	Order Granting Application For Interim Fees (Related Doc # 469) Granting for DS Feller Company, LLC, fees awarded: $3900.00 Signed on 8/8/2017. (jtp) (Entered: 08/08/2017)
08/08/2017	473 (1 pg)	Order Granting Application For Interim Fees (Related Doc # 470) Granting for Baker Newman Noyes, LLC, fees awarded: $4286.50, expenses awarded: $200.00 Signed on 8/8/2017. (jtp) (Entered: 08/08/2017)

08/10/2017	474 (3 pgs)	BNC Certificate of Notice - PDF Document. (RE: related document(s) 471 Order on Application for Interim Fees). No. of Notices: 12. Notice Date 08/10/2017. (Admin.) (Entered: 08/11/2017)
08/10/2017	475 (3 pgs)	BNC Certificate of Notice - PDF Document. (RE: related document(s) 472 Order on Application for Interim Fees). No. of Notices: 12. Notice Date 08/10/2017. (Admin.) (Entered: 08/11/2017)
08/10/2017	476 (3 pgs)	BNC Certificate of Notice - PDF Document. (RE: related document(s) 473 Order on Application for Interim Fees). No. of Notices: 12. Notice Date 08/10/2017. (Admin.) (Entered: 08/11/2017)
08/14/2017	477 (15 pgs)	Debtor-in-Possession Monthly Operating Report for Reporting Period July 31, 2017 Filed by Debtor Old Cold, LLC (Sklar, Daniel) (Entered: 08/14/2017)
09/12/2017	478 (13 pgs)	Debtor-in-Possession Monthly Operating Report for Reporting Period August 31, 2017 Filed by Debtor Old Cold, LLC (Sklar, Daniel) (Entered: 09/12/2017)
09/15/2017	479	Order Reassigning Case. Judge

	(1 pg)	Christopher J. Panos added to case. Involvement of Judge J. Michael Deasy ended Signed on 9/15/2017 (jtp) (Entered: 09/15/2017)
09/17/2017	480 (6 pgs)	BNC Certificate of Notice - PDF Document. (RE: related document(s) 479 Order Reassigning Case). No. of Notices: 168. Notice Date 09/17/2017. (Admin.) (Entered: 09/18/2017)
09/21/2017	481 (2 pgs)	**Administratively Corrected**Proposed Order *and Stipulation Amending Final Cash Collateral Order* Filed by Debtor Old Cold, LLC (RE: related document(s) 282 Order on Motion for Adequate Protection, Order on Motion to Use Cash Collateral) (Sklar, Daniel) Modified on 9/22/2017 Re-entered onto docket by Clerks Office; Incorrect filing event used.(jtp). (Entered: 09/21/2017)
09/21/2017	482 (2 pgs)	Stipulation and Order Amending Final Cash Collateral Order Filed by Debtor Old Cold, LLC (RE: related document(s) 282 Order on Motion for Adequate Protection, Order on Motion to Use Cash Collateral) (jtp) (Entered:

09/22/2017)

09/22/2017	483	An Administrative Error was found with the filing of Proposed Order and Stipulation Amending Final Cash Collateral Order (Court Doc. No. 481). The incorrect filing event was used. The Clerks Office has re-entered the document onto the case docket using the correct filing event. (RE: related document(s)481 Proposed Order filed by Debtor Old Cold, LLC). (jtp) (Entered: 09/22/2017)
10/10/2017	484 (2 pgs)	Order approving Signed on 10/10/2017 (RE: related document(s) 482 Stipulation filed by Debtor Old Cold, LLC) (dcs) (Entered: 10/10/2017)
10/11/2017	485 (13 pgs)	Debtor-in-Possession Monthly Operating Report for Reporting Period September 30, 2017 Filed by Debtor Old Cold, LLC (Sklar, Daniel) (Entered: 10/11/2017)
10/12/2017	486 (4 pgs)	BNC Certificate of Notice - PDF Document. (RE: related document(s) 484 Order). No. of Notices: 15. Notice Date 10/12/2017. (Admin.) (Entered: 10/13/2017)

11/06/2017	487 (2 pgs)	Notice of Appearance and Request for Notice by Geraldine Karonis Filed by U.S. Trustee Office of the U.S. Trustee (Karonis, Geraldine) (Entered: 11/06/2017)
11/07/2017	488 (13 pgs)	Debtor-in-Possession Monthly Operating Report for Reporting Period October 31, 2017 Filed by Debtor Old Cold, LLC (Sklar, Daniel) (Entered: 11/07/2017)
12/12/2017	489 (13 pgs)	Debtor-in-Possession Monthly Operating Report for Reporting Period November 30, 2017 Filed by Debtor Old Cold, LLC (Sklar, Daniel) (Entered: 12/12/2017)
01/16/2018	490 (13 pgs)	Debtor-in-Possession Monthly Operating Report for Reporting Period December 31, 2017 Filed by Debtor Old Cold, LLC (Sklar, Daniel) (Entered: 01/16/2018)
01/18/2018	491 (23 pgs; 5 docs)	Fourth Application for Interim Fees for DS Feller Company, LLC, Other Professional, Period: 6/1/2017 to 12/31/2017, Fee: $850.00, Expenses: $.Filed by Other Professional DS Feller Company, LLC Hearing scheduled for 2/26/2018 at 10:00 AM at Worcester Courtroom, Donohue

		Federal Bldg & Courthouse, 595 Main Street, Courtroom 3, Worcester MA. (Attachments: # 1 Exhibit A Invoice of DS Feller # 2 Fee Annex - Interim Request Exhibit B # 3 Proposed Order Exhibit C # 4 Notice of Hearing Exhibit D) (Sklar, Daniel) (Entered: 01/18/2018)
01/18/2018	492 (36 pgs; 6 docs)	Fifth Application for Interim Fees for Nixon Peabody LLP, Debtor's Attorney, Period: 6/1/2017 to 12/31/2017, Fee: $58,974.50, Expenses: $3,059.11.Filed by Debtor's Attorney Nixon Peabody LLP Hearing scheduled for 2/26/2018 at 10:00 AM at Worcester Courtroom, Donohue Federal Bldg & Courthouse, 595 Main Street, Courtroom 3, Worcester MA. (Attachments: # 1 Exhibit A Nixon Peabody Invoice for Bankruptcy Matter # 2 Exhibit B Nixon Peabody Invoices for Appeals # 3 Fee Annex - Interim Request Exhibit C # 4 Proposed Order Exhibit D # 5 Notice of Hearing) (Sklar, Daniel) (Entered: 01/18/2018)
01/31/2018	493 (43 pgs;	Mandate issued by US Court of Appeals for the First Circuit re:

	3 docs)	Appeal assigned case number 16-9016, Affirming ruling by Bankruptcy Court Signed on 1/29/2018 (RE: related document(s) 242 Notice of Appeal and Statement of Election filed by Creditor Mission Product Holdings, Inc., 429 Order Bankruptcy Appellate Panel re: Appeal) (Attachments: # 1 Opinion # 2 Judgment) (jtp) (Entered: 01/31/2018)
01/31/2018	494 (31 pgs; 3 docs)	Mandate issued by US Court of Appeals for the First Circuit re: Appeal assigned case number 16-9015, Affirming ruling by Bankruptcy Court Signed on 1/29/2018 (RE: related document(s) 333 Notice of Appeal and Statement of Election filed by Creditor Mission Product Holdings, Inc., 421 Order Bankruptcy Appellate Panel re: Appeal) (Attachments: # 1 Opinion # 2 Judgment) (jtp) Modified on 2/26/2018 to correct text (jtp). (Entered: 01/31/2018)
01/31/2018	495 (1 pg)	Case Management Conference Scheduled with regard to375 Stipulated Order Concerning Stay of Certain Matters with the Debtor and Mission Product

		Holdings, Inc. and Schleicher & Stebbins Hotels LLC). Conference to be held on 2/26/2018 at 10:00 AM at Worcester Courtroom, Donohue Federal Bldg & Courthouse, 595 Main Street, Courtroom 3, Worcester MA. (mbs) (Entered: 01/31/2018)
02/02/2018	496 (6 pgs)	BNC Certificate of Notice - Hearing. (RE: related document(s) 495 Hearing Scheduled). No. of Notices: 162. Notice Date 02/02/2018. (Admin.) (Entered: 02/03/2018)
02/12/2018	497 (13 pgs)	Debtor-in-Possession Monthly Operating Report for Reporting Period January 31, 2018 Filed by Debtor Old Cold, LLC (Sklar, Daniel) (Entered: 02/12/2018)
02/14/2018	498 (1 pg)	Mandate issued by Bankruptcy Appellate Panel re: Appeal assigned case number BAP NO. NH 15-065, In accordance with the Judgment of November 18, 2016, and pursuant to Federal Rules of Appellate Procedures 41(a), this constitutes the formal mandate of this court. Signed on 2/13/2018 (RE: related document(s) 242Notice of Appeal and Statement of Election filed by

		Creditor Mission Product Holdings, Inc., 429 Order Bankruptcy Appellate Panel re: Appeal) (jtp) Modified on 2/26/2018 to correct text.(jtp). (Entered: 02/14/2018)
02/22/2018	499 (1 pg)	Order Granting Application For Interim Fees (Related Doc # 491) Granting for DS Feller Company, LLC, fees awarded: $850.00, expenses awarded: $0.00 Signed on 2/22/2018. (jtp) (Entered: 02/22/2018)
02/22/2018	500 (1 pg)	Order Granting Application For Interim Fees (Related Doc # 492) Granting for Nixon Peabody LLP, fees awarded: $58974.50, expenses awarded: $3059.11 Signed on 2/22/2018. (jtp) (Entered: 02/22/2018)
02/24/2018	501 (3 pgs)	BNC Certificate of Notice - PDF Document. (RE: related document(s) 499 Order on Application for Interim Fees). No. of Notices: 11. Notice Date 02/24/2018. (Admin.) (Entered: 02/25/2018)
02/24/2018	502 (3 pgs)	BNC Certificate of Notice - PDF Document. (RE: related document(s) 500 Order on Application for Interim Fees). No. of Notices: 11. Notice Date 02/24/2018. (Ad-

min.) (Entered: 02/25/2018)

02/26/2018	503 (31 pgs; 3 docs)	Mandate issued by US Court of Appeals for the First Circuit re: Appeal assigned case number 16-9012, Affirming ruling by Bankruptcy Court ruling by Bankruptcy Court Signed on 2/22/2018 (RE: related document(s) 333 Notice of Appeal and Statement of Election filed by Creditor Mission Product Holdings, Inc., 421 Order Bankruptcy Appellate Panel re: Appeal, 494 Mandate/Judgment Issued re: Appeal) (Attachments: # 1 Opinion # 2 Judgment) (jtp) (Entered: 02/26/2018)
02/26/2018	504 (1 pg)	Mandate issued by Bankruptcy Appellate Panel re: Appeal assigned case number BAP NH 15-069, In accordance with Judgment of October 25, 2016, and pursuant to Federal Rules of Appellate Procedures 41(a), this constitutes the formal mandate of this court Signed on 2/23/2018 (RE: related document(s) 333Notice of Appeal and Statement of Election filed by Creditor Mission Product Holdings, Inc., 421 Order Bankruptcy Appellate Panel re: Appeal) (jtp)

(Entered: 02/26/2018)

02/26/2018	505 (1 pg)	**Order to Continue Telephonic Status Conference on Stipulated Order Concerning Stay of Certain Matters Signed on 2/26/2018 (RE: related document(s) 375 Order) Telephonic Status Conference to be held on 5/16/2018 at 10:00 AM at Worcester Courtroom, Donohue Federal Bldg & Courthouse, 595 Main Street, Courtroom 3, Worcester MA.** (jtp) (Entered: 02/27/2018)
03/01/2018	506 (6 pgs)	**BNC Certificate of Notice - PDF Document. (RE: related document(s) 505 Order to Continue/Schedule Hearing). No. of Notices: 160. Notice Date 03/01/2018.** (Admin.) (Entered: 03/02/2018)
03/14/2018	507 (13 pgs)	**Debtor-in-Possession Monthly Operating Report for Reporting Period February 1-28, 2018 Filed by Debtor Old Cold, LLC** (Sklar, Daniel) (Entered: 03/14/2018)
03/27/2018	508 (420 pgs; 4 docs)	**Adversary case 18-1026-CJP. Notice of Removal re Civil Case 18-cv-00223-PB by Mission Product Holdings, Inc. (Attachments: # 1 Motion to Refer # 2 District Court Documents pages 1-200**

		# 3 District Court Documents pages 201-413) (jtp) (Entered: 03/28/2018)
04/02/2018	509 (1 pg)	Notice of Change of Address Filed by Creditor Donna Flood (tmb) (Entered: 04/02/2018)
04/06/2018	510 (13 pgs)	Debtor-in-Possession Monthly Operating Report for Reporting Period March 1-31, 2018 Filed by Debtor Old Cold, LLC (Sklar, Daniel) (Entered: 04/06/2018)
04/16/2018	511 (23 pgs; 5 docs)	Third Application for Interim Fees for Baker Newman Noyes, LLC, Accountant, Period: 7/1/2017 to 1/22/2018, Fee: $2,251.00, Expenses: $110.00.Filed by Accountant Baker Newman Noyes, LLC Hearing scheduled for 5/16/2018 at 10:00 AM at Worcester Courtroom, Donohue Federal Bldg & Courthouse, 595 Main Street, Courtroom 3, Worcester MA. (Attachments: # 1 Exhibit A - Baker Newman Noyes Invoice # 2Fee Annex - Interim Request Exhibit B # 3 Proposed Order Exhibit C # 4 Notice of Hearing) (Sklar, Daniel) (Entered: 04/16/2018)

04/16/2018	512 (1 pg)	Proposed Order Filed by Accountant Baker Newman Noyes, LLC (RE: related document(s) 511 Application for Interim Fees filed by Accountant Baker Newman Noyes, LLC) (Sklar, Daniel) (Entered: 04/16/2018)
05/10/2018	513 (13 pgs)	Debtor-in-Possession Monthly Operating Report for Reporting Period April 1-30, 2018 Filed by Debtor Old Cold, LLC (Sklar, Daniel) (Entered: 05/10/2018)
05/16/2018	514 (1 pg)	Order, Status Conference held, Directing Parties to File Proposed Order Signed on 5/16/2018 (RE: related document(s) 375 Order) (jtp) (Entered: 05/16/2018)
05/16/2018	515 (1 pg)	Order Granting Application For Interim Fees (Related Doc # 511) Granting for Baker Newman Noyes, LLC, fees awarded: $2251.00, expenses awarded: $110.00 Signed on 5/16/2018. (jtp) (Entered: 05/16/2018)
05/16/2018	516 (2 pgs)	Notice of Appearance and Request for Notice by Daniel P. Keenan Filed by Creditor Mission Product Holdings, Inc. (Keenan,

Daniel) (Entered: 05/16/2018)

05/18/2018	517 (3 pgs)	BNC Certificate of Notice - PDF Document. (RE: related document(s) 514 Order Directing). No. of Notices: 12. Notice Date 05/18/2018. (Admin.) (Entered: 05/19/2018)
05/18/2018	518 (3 pgs)	BNC Certificate of Notice - PDF Document. (RE: related document(s) 515 Order on Application for Interim Fees). No. of Notices: 12. Notice Date 05/18/2018. (Admin.) (Entered: 05/19/2018)
05/25/2018	519 (4 pgs)	Order Approving Stipulated Order Concerning Stay of Certain Matters. Until such time as the Court holds a status conference or orders otherwise, all pending or applicable deadlines in the Stayed Matters pending before this Court shall remain stayed, including any and all discovery. The parties shall file a brief report every 120 days advising the Court as to the status of the appeal. Signed on 5/25/2018 (RE: related document(s) 375 Order) (cac) (Entered: 05/25/2018)
05/27/2018	520 (6 pgs)	BNC Certificate of Notice - PDF Document. (RE: related docu-

		ment(s) 519 Order). No. of Notices: 12. Notice Date 05/27/2018. (Admin.) (Entered: 05/28/2018)
06/11/2018	521 (11 pgs)	Assented Motion for Relief from Stay. *and Scheduling Final Hearing* Fee Amount $ 181. Filed by Creditor Schleicher & Stebbins Hotels, L.L.C. (Candon, Christopher) (Entered: 06/11/2018)
06/11/2018	522	Receipt of Motion for Relief From Stay(15-11400-CJP) [motion,mrlfsty] (181.00) filing fee. Receipt number 3428287, Fee amount $ 181.00. (re: Doc#521). (U.S. Treasury) (Entered: 06/11/2018)
06/12/2018	523 (2 pgs)	Objection - *Preliminary Objection* Filed by Creditor Mission Product Holdings, Inc. (RE: related document(s) 521 Motion for Relief From Stay filed by Creditor Schleicher & Stebbins Hotels, L.L.C.) (Keenan, Daniel) (Entered: 06/12/2018)
06/12/2018	524 (16 pgs)	Debtor-in-Possession Monthly Operating Report for Reporting Period May 1-31, 2018 Filed by Debtor Old Cold, LLC (Sklar, Daniel) (Entered: 06/12/2018)

06/13/2018	525 (2 pgs)	Certificate of Service Filed by Creditor Mission Product Holdings, Inc. (RE: related document(s) 523Objection filed by Creditor Mission Product Holdings, Inc.) (Keenan, Daniel) (Entered: 06/13/2018)
06/15/2018	526 (1 pg)	Order: The Request for Combined Hearing On the Motion is Denied and the Court Hereby Schedules a Preliminary Telephonic Hearing. Objections to the Motion Shall Be Filed on or Before July 3, 2018. Parties Should Contact Calendar Clerk To Obtain Dial-In Information. Signed on 6/15/2018 (RE: related document(s) 521 Motion for Relief From Stay filed by Creditor Schleicher & Stebbins Hotels, L.L.C.) Hearing scheduled for 7/10/2018 at 10:00 AM (cac) Modified on 6/15/2018 Location information removed(jtp). (Entered: 06/15/2018)
06/17/2018	527 (6 pgs)	BNC Certificate of Notice - PDF Document. (RE: related document(s) 526 Order to Continue/Schedule Hearing). No. of Notices: 156. Notice Date 06/17/2018. (Admin.) (Entered: 06/18/2018)

07/03/2018	528 (33 pgs; 3 docs)	Objection Filed by Creditor Mission Product Holdings, Inc. (RE: related document(s) 521 Motion for Relief From Stay filed by Creditor Schleicher & Stebbins Hotels, L.L.C.) (Attachments: # 1 Exhibit 1 - Unofficial Transcription of Oral Argument # 2 Certificate of Service) (Keenan, Daniel) (Entered: 07/03/2018)
07/09/2018	529 (1 pg)	Notice of Rescheduled Telephonic Hearing. TIME CHANGE ONLY (RE: related document(s)521 Motion for Relief From Stay filed by Creditor Schleicher & Stebbins Hotels, L.L.C.). Hearing rescheduled for 7/10/2018 at 11:00 AM (mbs) (Entered: 07/09/2018)
07/11/2018	530 (13 pgs)	Debtor-in-Possession Monthly Operating Report for Reporting Period June 1-30, 2018 Filed by Debtor Old Cold, LLC (Sklar, Daniel) (Entered: 07/11/2018)
07/11/2018	531 (6 pgs)	BNC Certificate of Notice. (RE: related document(s) 529 Notice of Rescheduled Hearing). No. of Notices: 161. Notice Date 07/11/2018. (Admin.) (Entered: 07/12/2018)

07/12/2018	532 (1 pg)	Order to Schedule Evidentiary Hearing. Debtor and Movant shall file briefs on or before August 27, 2018. Mission Product Holdings shall file a response on or before September 12, 2018. Signed on 7/12/2018 (RE: related document(s) 521 Motion for Relief From Stay filed by Creditor Schleicher & Stebbins Hotels, L.L.C.) Evidentiary hearing scheduled for 9/18/2018 at 10:00 AM at Courtroom A. (cac) (Entered: 07/12/2018)
07/14/2018	533 (6 pgs)	BNC Certificate of Notice - PDF Document. (RE: related document(s) 532 Order to Continue/Schedule Hearing). No. of Notices: 156. Notice Date 07/14/2018. (Admin.) (Entered: 07/15/2018)
07/18/2018	534 (109 pgs; 7 docs)	Motion to Convert Chapter 11 Case to Chapter 7. Fee Amount $ 15. Filed by Creditor Mission Product Holdings, Inc. Hearing scheduled for 9/18/2018 at 10:00 AM (check with court for location). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Proposed Order # 5 Notice of Hearing # 6 Certificate of Service) (Keenan, Daniel) (Entered: 07/18/2018)

07/18/2018	535	Receipt of Motion to Convert to Chapter 7(15-11400-CJP) [motion,m119cn7] (15.00) filing fee. Receipt number 3443287, Fee amount $ 15.00. (re: Doc#534). (U.S. Treasury) (Entered: 07/18/2018)
08/14/2018	536 (13 pgs)	Debtor-in-Possession Monthly Operating Report for Reporting Period July 1-31, 2018 Filed by Debtor Old Cold, LLC (Sklar, Daniel) (Entered: 08/14/2018)
08/16/2018	537 (27 pgs; 2 docs)	The official transcript re: Status Hearing, Fourth Application for Interim Fees for DS Feller Company, LLC, Fifth Application for Interim Fees for Nixon Peabody LLP, Debtor's Attorney heard on 2/26/2018 has been filed. Pursuant to Judicial Conference Policy electronic access to transcripts is restricted for 90 days from the date of filing. The transcript release date is 11/14/2018. The transcript is available for review at the Clerk's Office or a copy may be purchased from the transcriber. Parties have until 9/6/2018 to file a Request for Redaction. (RE: related document(s) 491 Application for Interim Fees filed by Other Profes-

		sional DS Feller Company, LLC, 492 Application for Interim Fees filed by Debtor's Attorney Nixon Peabody LLP). Notice of Intent to Request Redaction Deadline Due by 8/23/2018. Redaction Request Due by 9/6/2018. Redacted Transcript Submission Due by 9/17/2018. Transcript access will be restricted through 11/14/2018. (gll) (Entered: 08/16/2018)
08/16/2018	538 (14 pgs; 2 docs)	The official transcript re: Third Application for Interim Fees for Baker Newman Noyes, LLC, and Status Hearing heard on 5/16/2018 has been filed. Pursuant to Judicial Conference Policy electronic access to transcripts is restricted for 90 days from the date of filing. The transcript release date is 11/14/2018. The transcript is available for review at the Clerk's Office or a copy may be purchased from the transcriber. Parties have until 9/6/2018 to file a Request for Redaction. (RE: related document(s)511 Application for Interim Fees filed by Accountant Baker Newman Noyes, LLC). Notice of Intent to Request Redaction Deadline Due by

		8/23/2018. Redaction Request Due by 9/6/2018. Redacted Transcript Submission Due by 9/17/2018. Transcript access will be restricted through 11/14/2018. (gll) (Entered: 08/16/2018)
08/24/2018	539 (2 pgs)	Notice of Substitution of Appearance and Request for Notice by Daniel P. Keenan. Daniel P. Keenan has withdrawn. Filed by Creditor Mission Product Holdings, Inc. (Keenan, Daniel) (Entered: 08/24/2018)
08/27/2018	540 (134 pgs; 4 docs)	Objection Filed by Debtor Old Cold, LLC (RE: related document(s) 534 Motion to Convert to Chapter 7 filed by Creditor Mission Product Holdings, Inc.) (Attachments: # 1 Exhibit March 22, 2016 Hearing Transcript # 2 Exhibit February 26, 2018 Hearing Trascript # 3 Exhibit Bankruptcy Auction Trascript) (Sklar, Daniel) (Entered: 08/27/2018)
08/27/2018	541 (116 pgs; 4 docs)	Reply *in Support of Assented-To Motion for Relief from Automatic Stay and Objection to Motion to Convert Case* Filed by Creditor Schleicher & Stebbins Hotels, L.L.C. (RE: related docu-

		ment(s) 521 Motion for Relief From Stay filed by Creditor Schleicher & Stebbins Hotels, L.L.C., 528 Objection filed by Creditor Mission Product Holdings, Inc., 534 Motion to Convert to Chapter 7 filed by Creditor Mission Product Holdings, Inc.) (Attachments: # 1 Exhibit A # 2 Exhibit B # 3 Exhibit C) (Candon, Christopher) (Entered: 08/27/2018)
08/28/2018	542 (3 pgs)	Amended Certificate of Service Filed by Creditor Schleicher & Stebbins Hotels, L.L.C. (RE: related document(s) 541 Reply filed by Creditor Schleicher & Stebbins Hotels, L.L.C.) (Candon, Christopher) (Entered: 08/28/2018)
09/05/2018	543 (1 pg)	Notice of Rescheduled Hearing. TIME AND LOCATION CHANGE (RE: related document(s)521 Motion for Relief From Stay filed by Creditor Schleicher & Stebbins Hotels, L.L.C.). Hearing scheduled for 9/18/2018 at 01:00 PM at Worcester Courtroom, Donohue Federal Bldg & Courthouse, 595 Main Street, Courtroom 3, Worcester MA. (mbs) (Entered: 09/05/2018)

09/05/2018	544 (1 pg)	Notice of Rescheduled Hearing. TIME AND LOCATION CHANGE (RE: related document(s)534 Motion to Convert to Chapter 7 filed by Creditor Mission Product Holdings, Inc.). Hearing scheduled for 9/18/2018 at 01:00 PM at Worcester Courtroom, Donohue Federal Bldg & Courthouse, 595 Main Street, Courtroom 3, Worcester MA. (mbs) (Entered: 09/05/2018)
09/07/2018	545 (6 pgs)	BNC Certificate of Notice. (RE: related document(s) 543 Notice of Rescheduled Hearing). No. of Notices: 159. Notice Date 09/07/2018. (Admin.) (Entered: 09/08/2018)
09/07/2018	546 (6 pgs)	BNC Certificate of Notice. (RE: related document(s) 544 Notice of Rescheduled Hearing). No. of Notices: 159. Notice Date 09/07/2018. (Admin.) (Entered: 09/08/2018)
09/10/2018	547 (1 pg)	The official transcript re: Assented Motion for Relief from Stay. and Scheduling Final Hearing heard on 7/10/2018 has been filed. Pursuant to Judicial Conference Policy electronic access to transcripts is restricted for 90 days

		from the date of filing. The transcript release date is 12/10/2018. The transcript is available for review at the Clerk's Office or a copy may be purchased from the transcriber. Parties have until 10/1/2018 to file a Request for Redaction. (RE: related document(s)521 Motion for Relief From Stay filed by Creditor Schleicher & Stebbins Hotels, L.L.C.). Notice of Intent to Request Redaction Deadline Due by 9/17/2018. Redaction Request Due by 10/1/2018. Redacted Transcript Submission Due by 10/11/2018. Transcript access will be restricted through 12/10/2018. (gll) (Entered: 09/10/2018)
09/11/2018	548 (13 pgs)	Debtor-in-Possession Monthly Operating Report for Reporting Period August 1 - 31, 2018 Filed by Debtor Old Cold, LLC (Sklar, Daniel) (Entered: 09/11/2018)
09/12/2018	549 (67 pgs; 3 docs)	Response - *Mission Product Holdings, Inc.'s Omnibus Response to (A) Schleicher & Stebbins Hotels L.L.C.'s (I) Reply in Support of Assented-To Motion for Relief From Automatic Stay and (II) Objection to Motion to Convert and (B) Debtor's Ob-*

		jection to Mission Product Holdings, Inc.'s Motion for Conversion to Chapter 7 Filed by Creditor Mission Product Holdings, Inc. (RE: related document(s) 521 Motion for Relief From Stay filed by Creditor Schleicher & Stebbins Hotels, L.L.C., 528 Objection filed by Creditor Mission Product Holdings, Inc., 534 Motion to Convert to Chapter 7 filed by Creditor Mission Product Holdings, Inc., 540 Objection filed by Debtor Old Cold, LLC, 541 Reply filed by Creditor Schleicher & Stebbins Hotels, L.L.C.) (Attachments: # 1 Exhibit A # 2 Certificate of Service) (Tilsley, Roy) (Entered: 09/12/2018)
09/12/2018	550 (3 pgs)	BNC Certificate of Notice. (RE: related document(s) 547 Transcript). No. of Notices: 8. Notice Date 09/12/2018. (Admin.) (Entered: 09/13/2018)
09/19/2018	551 (1 pg)	Order Denying Motion to Convert Case to Chapter 7 (Related Doc # 534) Signed on 9/19/2018. (cac) (Entered: 09/20/2018)
09/19/2018	552	Order Granting Motion For Re-

	(1 pg)	lief From Stay filed by Creditor Schleicher & Stebbins Hotels, L.L.C. (Related Doc # 521) Signed on 9/19/2018. (cac) (Entered: 09/20/2018)
09/22/2018	553 (3 pgs)	BNC Certificate of Notice - PDF Document. (RE: related document(s) 552 Order on Motion For Relief From Stay). No. of Notices: 15. Notice Date 09/22/2018. (Admin.) (Entered: 09/23/2018)
09/22/2018	554 (3 pgs)	BNC Certificate of Notice - PDF Document. (RE: related document(s) 551 Order on Motion to Convert Case to Chapter 7). No. of Notices: 15. Notice Date 09/22/2018. (Admin.) (Entered: 09/23/2018)
10/01/2018	555 (5 pgs)	Notice of Appeal and Statement of Election to Bankruptcy Appellate Panel. Fee Amount $298 Filed by Creditor Mission Product Holdings, Inc. (RE: related document(s) 552 Order on Motion For Relief From Stay) (Keach, Robert) (Entered: 10/01/2018)
10/01/2018	556	Receipt of Notice of Appeal and Statement of Election(15-11400-CJP) [appeal,ntcaplel] (298.00) filing fee. Receipt number

		3473202, Fee amount $ 298.00. (re: Doc#555). (U.S. Treasury) (Entered: 10/01/2018)
10/01/2018	557	Court's Certificate of Mailing of Appeal. Date copies electronically sent on October 1, 2018 Copies electronically sent to: Roy Tilsley and Robert Keach as counsel for Misson Product Holdings, Inc.; Christopher Candon, counsel for Schleicher & Stebbins Hotels, LLC; Christopher Desiderio and Daniel Sklar as counsel for Old Cold, LLC (RE: related document(s)555 Notice of Appeal and Statement of Election filed by Creditor Mission Product Holdings, Inc.). (dcs) (Entered: 10/01/2018)
10/01/2018	558 (64 pgs; 2 docs)	Transmittal of Appeal to BAP (RE: related document(s)555 Notice of Appeal and Statement of Election filed by Creditor Mission Product Holdings, Inc.). (Attachments: # 1 Notice of Appeal) (dcs) (Entered: 10/01/2018)
10/01/2018	559 (1 pg)	Notice to Appellant re: Notice of Appeal. The following items should be filed on or before October 15, 2018. (1) Designation of

		Items on Appeal, (2) Statement of Issues and (3) Written Notice a Transcript has been Ordered or a Certificate Stating No Transcript is Being Ordered. (RE: related document(s)555 Notice of Appeal and Statement of Election filed by Creditor Mission Product Holdings, Inc.). (dcs) (Entered: 10/01/2018)
10/03/2018	560	Notice of Docketing Record on Appeal to BAP. Case Number Assigned: 18-0048 (RE: related document(s)555 Notice of Appeal and Statement of Election filed by Creditor Mission Product Holdings, Inc.). (dcs) (Entered: 10/03/2018)
10/03/2018	561 (3 pgs)	BNC Certificate of Notice. (RE: related document(s) 559 Notice to Appellant re: Appeal). No. of Notices: 9. Notice Date 10/03/2018. (Admin.) (Entered: 10/04/2018)
10/04/2018	562 (1 pg)	The official transcript re: Assented Motion for Relief from Stay, Motion to Convert Chapter 11 Case to Chapter 7 heard on 9/18/2018 has been filed. Pursuant to Judicial Conference Policy electronic access to transcripts is restricted for 90 days from the

		date of filing. The transcript release date is 1/2/2019. The transcript is available for review at the Clerk's Office or a copy may be purchased from the transcriber. Parties have until 10/25/2018 to file a Request for Redaction. (RE: related document(s)521 Motion for Relief From Stay filed by Creditor Schleicher & Stebbins Hotels, L.L.C., 534 Motion to Convert to Chapter 7 filed by Creditor Mission Product Holdings, Inc.). Notice of Intent to Request Redaction Deadline Due by 10/11/2018. Redaction Request Due by 10/25/2018. Redacted Transcript Submission Due by 11/5/2018. Transcript access will be restricted through 1/2/2019. (gll) (Entered: 10/04/2018)
10/06/2018	563 (3 pgs)	BNC Certificate of Notice. (RE: related document(s) 562 Transcript). No. of Notices: 9. Notice Date 10/06/2018. (Admin.) (Entered: 10/07/2018)
10/10/2018	564 (10 pgs)	Debtor-in-Possession Monthly Operating Report for Reporting Period September 30, 2018 Filed by Debtor Old Cold, LLC (Sklar,

Daniel) (Entered: 10/10/2018)

10/11/2018	565 (4 pgs)	Statement of Issues on Appeal *(Appellant's)* Filed by Creditor Mission Product Holdings, Inc. (RE: related document(s) 555 Notice of Appeal and Statement of Election filed by Creditor Mission Product Holdings, Inc.) (Tilsley, Roy) (Entered: 10/11/2018)
10/11/2018	566 (9 pgs)	Appellant Designation of Contents For Inclusion in Record On Appeal Filed by Creditor Mission Product Holdings, Inc. (RE: related document(s) 555 Notice of Appeal and Statement of Election filed by Creditor Mission Product Holdings, Inc.) Appellee designation due by 10/25/2018. Transmission of Designation due by 11/13/2018. (Tilsley, Roy) (Entered: 10/11/2018)
10/18/2018	567 (5 pgs; 2 docs)	Assented Motion to Extend Time / Agreement in connection with delay in Supreme Court determination on Petition for Certiorari. to November 5, 2018 Filed by Creditor Mission Product Holdings, Inc. (RE: related document(s) 521 Motion for Relief From Stay filed by Creditor

		Schleicher & Stebbins Hotels, L.L.C., 552Order on Motion For Relief From Stay) (Attachments: # 1 Proposed Order) (Tilsley, Roy) (Entered: 10/18/2018)
10/19/2018	568 (2 pgs)	Order Granting Motion to Extend Time to extend the stay of effectiveness of the order to November 5, 2018 (related document(s): 567 Motion to Extend Time/Agreement in connection with delay in Supreme Court determination on Petition for Certiorari. to November 5, 2018 filed by Creditor Mission Product Holdings, Inc.) . Signed on 10/19/2018. (dcs) (Entered: 10/19/2018)
10/21/2018	569 (4 pgs)	BNC Certificate of Notice - PDF Document. (RE: related document(s) 568 Order on Motion to Extend Time). No. of Notices: 3. Notice Date 10/21/2018. (Admin.) (Entered: 10/22/2018)
10/24/2018	570 (43 pgs; 6 docs)	Sixth Application for Interim Fees for Nixon Peabody LLP, Debtor's Attorney, Period: 1/1/2018 to 9/30/2018, Fee: $103,382.00, Expenses: $2,430.14.Filed by Debtor's Attorney Nixon Peabody LLP

		Hearing scheduled for 12/11/2018 at 10:00 AM at Worcester Courtroom, Donohue Federal Bldg & Courthouse, 595 Main Street, Courtroom 3, Worcester MA. (Attachments: # 1 Exhibit A - Nixon Peabody Invoices - Bankruptcy # 2 Exhibit B - Nixon Peabody Invoices - Appeals # 3 Fee Annex - Interim Request Exhibit C # 4 Proposed Order Exhibit D # 5 Notice of Hearing) (Sklar, Daniel) (Entered: 10/24/2018)
10/24/2018	571 (23 pgs; 5 docs)	Fifth Application for Interim Fees for DS Feller Company, LLC, Other Professional, Period: 1/1/2018 to 9/30/2018, Fee: $2,950.00, Expenses: $0.00.Filed by Other Professional DS Feller Company, LLC Hearing scheduled for 12/11/2018 at 10:00 AM at Worcester Courtroom, Donohue Federal Bldg & Courthouse, 595 Main Street, Courtroom 3, Worcester MA. (Attachments: # 1 Exhibit A - DS Feller Company, LLC Invoices # 2 Fee Annex - Interim Request Exhibit B # 3 Proposed Order Exhibit C # 4 Notice of Hearing) (Sklar, Daniel) (Entered: 10/24/2018)
10/24/2018	572	Appellee Designation of Contents

	(7 pgs)	for Inclusion in Record of Appeal *of Additional Items to be Included in the Record of Appeal* Filed by Creditor Schleicher & Stebbins Hotels, L.L.C. (RE: related document(s) 555Notice of Appeal and Statement of Election filed by Creditor Mission Product Holdings, Inc., 566 Appellant Designation filed by Creditor Mission Product Holdings, Inc.) (Candon, Christopher) (Entered: 10/24/2018)
10/30/2018	573 (7 pgs; 2 docs)	Motion to Extend Time due to Supreme Court's granting of Mission's Petition for Certiorari to - Until final resolution of Supreme Court appeal Filed by Creditor Mission Product Holdings, Inc. (RE: related document(s) 552 Order on Motion For Relief From Stay, 568 Order on Motion to Extend Time) (Attachments: # 1 Proposed Order) (Tilsley, Roy) (Entered: 10/30/2018)
10/30/2018	574 (6 pgs; 2 docs)	Motion to Expedite Hearing , Motion to Shorten Notice , Motion to Limit Notice Filed by Creditor Mission Product Holdings, Inc. (RE: related document(s) 573 Motion to Extend

		Time filed by Creditor Mission Product Holdings, Inc.) (Attachments: # 1 Proposed Order) (Tilsley, Roy) (Entered: 10/30/2018)
10/30/2018	575 (1 pg)	Certificate of Service Filed by Creditor Mission Product Holdings, Inc. (RE: related document(s) 573Motion to Extend Time filed by Creditor Mission Product Holdings, Inc., 574 Motion to Expedite Hearing filed by Creditor Mission Product Holdings, Inc., Motion to Shorten Notice, Motion to Limit Notice) (Tilsley, Roy) (Entered: 10/30/2018)
10/31/2018	576 (2 pgs)	Order Granting Motion Expedited determination of Motion for Extension of Stay of Effectiveness of Order , Denying Motion To Shorten Notice (Related Doc # 574), Denying Motion To Limit Notice (Related Doc # 574) Signed on 10/31/2018. (dcs) (Entered: 10/31/2018)
10/31/2018	577 (6 pgs)	Order Denying in Part Motion to Extend Time (related document(s): 573 Motion to Extend Time due to Supreme Court's granting of Mission's Petition for Certiorari to - Until final resolu-

		tion of Supreme Court appeal filed by Creditor Mission Product Holdings, Inc.). Signed on 10/31/2018. (dcs) (Entered: 10/31/2018)
11/02/2018	578 (8 pgs)	BNC Certificate of Notice - PDF Document. (RE: related document(s) 577 Order on Motion to Extend Time). No. of Notices: 15. Notice Date 11/02/2018. (Admin.) (Entered: 11/03/2018)
11/02/2018	579 (4 pgs)	BNC Certificate of Notice - PDF Document. (RE: related document(s) 576 Order on Motion to Expedite Hearing). No. of Notices: 9. Notice Date 11/02/2018. (Admin.) (Entered: 11/03/2018)
11/13/2018	580 (912 pgs; 2 docs)	Transmittal of Record on Appeal to BAP APPELLANT PART 1 OF 6 (RE: related document(s)555 Notice of Appeal and Statement of Election filed by Creditor Mission Product Holdings, Inc.). (Attachments: # 1Appellant DOR - Part 1 of 6) (dcs) (Entered: 11/13/2018)
11/13/2018	581 (556 pgs; 2 docs)	Transmittal of Record on Appeal to BAP APPELLANT PART 3 OF 6 (RE: related document(s)555 Notice of Appeal and

		Statement of Election filed by Creditor Mission Product Holdings, Inc.). (Attachments: # 1Appellant DOR - Part 3) (dcs) (Entered: 11/13/2018)
11/13/2018	582 (6 pgs; 2 docs)	Transmittal of Record on Appeal to BAP APPELLANT PART 4 OF 6 (RE: related document(s)555 Notice of Appeal and Statement of Election filed by Creditor Mission Product Holdings, Inc.). (Attachments: # 1Appellant DOR - Part 4) (dcs) (Entered: 11/13/2018)
11/13/2018	583 (186 pgs; 2 docs)	Transmittal of Record on Appeal to BAP APPELLANT PART 5 OF 6 (RE: related document(s)555 Notice of Appeal and Statement of Election filed by Creditor Mission Product Holdings, Inc.). (Attachments: # 1Appellant DOR - Part 5) (dcs) (Entered: 11/13/2018)
11/13/2018	584 (440 pgs; 2 docs)	Transmittal of Record on Appeal to BAP APPELLANT PART 6 OF 6 (RE: related document(s)555 Notice of Appeal and Statement of Election filed by Creditor Mission Product Holdings, Inc.). (Attachments: # 1Appellant DOR - Part 6) (dcs)

(Entered: 11/13/2018)

11/13/2018	585 (1099 pgs; 2 docs)	Transmittal of Record on Appeal to BAP APPELLEE PART 1 OF 3 (RE: related document(s)555 Notice of Appeal and Statement of Election filed by Creditor Mission Product Holdings, Inc.). (Attachments: # 1Appellee DOR - Part 1) (dcs) (Entered: 11/13/2018)
11/13/2018	586 (1207 pgs; 2 docs)	Transmittal of Record on Appeal to BAP APPELLEE PART 2 OF 3 (RE: related document(s)555 Notice of Appeal and Statement of Election filed by Creditor Mission Product Holdings, Inc.). (Attachments: # 1Appellee DOR - Part 2) (dcs) (Entered: 11/13/2018)
11/13/2018	587 (556 pgs; 2 docs)	Transmittal of Record on Appeal to BAP APPELLEE PART 3 OF 3 (RE: related document(s)555 Notice of Appeal and Statement of Election filed by Creditor Mission Product Holdings, Inc.). (Attachments: # 1Appellee DOR - Part 3) (dcs) (Entered: 11/13/2018)
11/13/2018	588 (323 pgs;	Transmittal of Record on Appeal to BAP APPELLANT PART 2

	2 docs)	OF 6 (RE: related document(s)555 Notice of Appeal and Statement of Election filed by Creditor Mission Product Holdings, Inc.). (Attachments: # 1Appellant DOR - Part 2) (dcs) (Entered: 11/13/2018)
11/13/2018	589 (13 pgs)	Debtor-in-Possession Monthly Operating Report for Reporting Period October 1-31, 2018 Filed by Debtor Old Cold, LLC (Sklar, Daniel) (Entered: 11/13/2018)
11/13/2018	590 (44 pgs; 5 docs)	Application to Employ of Ropes & Gray LLP as Special Counsel Filed by Debtor Old Cold, LLC Hearing scheduled for 12/11/2018 at 10:00 AM at Worcester Courtroom, Donohue Federal Bldg & Courthouse, 595 Main Street, Courtroom 3, Worcester MA. (Attachments: # 1 Affidavit Exhibit A - Declaration of Douglas H. Hallward-Driemeier # 2 Exhibit B - Engagement Agreement Between the Debtor and Ropes & Gray # 3Proposed Order Exhibit C # 4 Notice of Hearing) (Sklar, Daniel) (Entered: 11/13/2018)

CO-MARKETING AND DISTRIBUTION AGREEMENT (WITH EXHIBITS), EFFECTIVE AS OF NOVEMBER 21, 2012, BANKR. DKT. 211-1, FILED OCTOBER 15, 2015

CO-MARKETING AND DISTRIBUTION AGREEMENT

This Co-Marketing, Sourcing and Distribution Agreement (this "Agreement"), is made effective as of November 21, 2012 ("Effective Date"), by and between Tempnology, LLC d/b/a Coolcore ("***CC***") and Mission Product Holdings, Inc.("***MP***").

WITNESSETH :

WHEREAS, CC and MP have executed a Binding Term Sheet dated as of November 21, 2012 (the "Term Sheet") in which the parties outlined key terms for an arrangement related to product sourcing, co-marketing and distribution of certain textile-based cooling products produced by or through CC.

WHEREAS, the Term Sheet anticipates that the parties will negotiate and agree upon a definitive agreement that will supersede the Term Sheet and the parties desire to do so; and

NOW, THEREFORE, in consideration of the mutual agreements set forth herein, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties do hereby agree as follows:

1) **Territory:**

   A) During the term of this Agreement and upon the terms and conditions set forth herein (including without limitation the

terms of Sections 5 and 6 hereof), with respect to the Cooling Accessories (as defined below) MP will have, and CC hereby grants MP, exclusive distribution rights within the United States and first rights of notice and of refusal as further defined below in this paragraph on exclusive distribution rights in certain other countries, excluding the specific countries identified in the License and Distribution agreement dated as of January 21, 2013 (the "ReYs Agreement") between CC and Qingdao Rey.S Culture and Media Company ("ReYs") — namely, the countries of China, Japan, Taiwan, Hong Kong, Korea, Singapore, Malaysia, Indonesia, Philippines, Thailand and Vietnam (the "ReYs Territories"). The United States as well as such other countries and territories that MP acquires exclusive distribution rights to pursuant to its first rights of refusal and notice hereunder are referred to collectively as the "Exclusive Territory". For the avoidance of doubt, during the term of the ReYs Agreement, ReYs has the exclusive right to sell CC's Cooling Accessories under the Coolcore trademark in the ReYs Territories. For the purposes of this Agreement, the term "Cooling Accessories" shall mean products of the specific types listed on Exhibit A hereto manufactured by or on behalf of CC and additional products that are hereafter developed by CC that are added to the term Cooling Accessories pursuant to the terms of Section 13 hereof (such additional products being sometimes herein

referred to as "Cooling Accessory Derivatives" if they are not substantially distinct from the items on Exhibit A and "New Products" if they are substantially distinct from the items on Exhibit A, it being understood that both Cooling Accessory Derivatives and New Products shall be deemed Cooling Accessories hereunder).

B) For clarity, it is expressly understood that MP shall have the right to sell Cooling Accessories throughout the world, and shall have exclusive rights (consistent with the Product Exclusivity provisions of Sections 5 and 6 below) in the Exclusive Territory. CC shall inform MP prior to agreeing to sell any Cooling Accessories (directly or indirectly) in any territory outside the United States, excluding (for the term of the ReYs Agreement only) the ReYs Territories; provided that CC shall inform MP of any pending renewals and renegotiations of the ReYs Agreement and the associated terms of any renewal or renegotiation shall be treated in the same manner as any other "International Term Sheet" (as such term is defined below). It is, however, expressly understood and agreed that, at no time in the future, will ReYs be classified as a "Sports Distributor" (as such term is defined below) based on the ReYs Agreement for the purposes of the right of first refusal set forth below and therefore MP shall only be entitled to a right of first notice with respect thereto as provided for under Subsection 1(D) hereof.

C) MP shall have the right of first refusal to match any term sheet or memorandum of understanding for the sale of Cooling Accessories in any country outside of the United States ("International Term Sheet") if such International Term Sheet relates to a Sports Distributor, in which case the applicable territory will become an Exclusive Territory hereunder in the Sports Distributor channel only; provided that MP has agreed in writing to match the applicable International Term Sheet within ninety (90) days of the date such International Term Sheet is presented to MP. For the purposes of this Agreement, the term "Sports Distributor" shall mean an entity that acts directly or indirectly as a distributor with more than 25% of its end distribution consisting of customers in the Sporting Channel (as such term is hereinafter defined). Upon matching the applicable International Term Sheet, the parties hereto shall amend this Agreement to reflect the terms of such International Term Sheet.

D) If the International Term Sheet does not relate to a Sports Distributor, then, after CC has informed MP of the terms of such International Term Sheet, MP will have forty-five (45) days to match such terms, in which case CC shall consider MP's offer in good faith but will not be obligated to accept such offer. Should CC elect to accept MP's offer then the applicable territory will become an Exclusive Territory hereunder for all applicable channels and this Agree-

ment shall be amended to reflect the terms of such International Term Sheet.

E) Further, both parties agree to use their commercially reasonable good faith efforts during the 120 day period following the Effective Date to establish a relationship with ReYs as well as a relationship with MP's agent in China. Provided the parties exercise such efforts, the failure to establish such relationships shall not constitute a breach hereof.

2) **Term:**

The initial term of this Agreement will commence upon the Effective Date and expire on July 1, 2016 (the "Initial Term"). Following the Initial Term, the Agreement will automatically renew (subject to the parties' termination rights specified below) for additional one-year periods (each a "Renewal Term") from July 2 of the then-current calendar year until July 1 of the following calendar year. Each such yearly period (whether during the Initial Term or a Renewal Term) is referred to herein as a "Contract Year," except that the first Contract Year will run from the Execution Date until July 1, 2014. The Initial Term and any Renewal Terms are together referred to as the "Term".

3) **Termination:**

Either party may terminate this Agreement without cause by providing written notice during May or June of any Contract Year, in which case the Agreement will terminate as of the

last day of the second full Contract Year following timely notice of termination. For example, a termination notice delivered on June 1, 2014 would result in an effective date of termination of July 1, 2016. Notwithstanding the foregoing, and except as otherwise provided herein, either one of the parties may terminate this Agreement following the commission by the other party of a breach of a material term hereof (excluding alleged breaches by MP in the nature of nonpayment, which are subject to termination pursuant to Section 3(i) below only), after written notification to the other party that it shall have 90 days to remedy such breach. If such breach is not remedied or cured within the 90-day period, the aggrieved party may terminate this Agreement after the expiration of such cure period by written notice to the defaulting party. A breach by a party hereunder shall be deemed cured if the party alleged to have committed such breach ceases within the above specified cure period the activity which is the basis of the alleged breach. If there is a dispute as to whether a breach exists or has been cured, this Agreement shall remain in effect until such dispute is resolved pursuant to the Dispute Resolution provision below. In addition to the foregoing, (i) CC may terminate this Agreement (but not any PO's under which undisputed amounts have been paid) if MP has failed to pay any amount in excess of $25,000 in the aggregate due under any PO (or PO's) on a timely basis and such failure continues to exist after the passage of 30 days after CC has confirmed that MP has received written notice from CC to MP of the existence

of such failure (provided that if MP in good faith disputes whether payment thereof is due this Agreement shall remain in effect until such dispute is resolved pursuant to the Dispute Resolution provision below), and (ii) CC may terminate this Agreement immediately upon written notice (or if immediate termination is not permitted under applicable law, then upon the shortest notice and cure period permitted) upon the filing of a petition in bankruptcy or for reorganization under any bankruptcy, receivership, insolvency or other similar law by or against MP; or upon MP's becoming insolvent (as finally determined by a court of competent jurisdiction) or making an assignment for benefit of creditors or taking other similar action; and (iii) MP may terminate this Agreement immediately upon written notice (or if immediate termination is not permitted under applicable law, then upon the shortest notice and cure period permitted) upon the filing of a petition in bankruptcy or for reorganization under any bankruptcy, receivership, insolvency or other similar law by or against CC or upon CC's becoming insolvent (as finally determined by a court of competent jurisdiction) or making an assignment for benefit of creditors or taking other similar action.

4) **Effect of Termination:**

In the event of any termination of this Agreement MP shall have the right to purchase, distribute and sell, in accordance with the provisions of this Agreement, and notwithstanding the termination of this Agreement, those Cooling Accessories and other products which shall

have been delivered to MP or ordered by MP on or before the date of such termination for such period of time as is reasonably required by MP to sell such Cooling Accessories and other products, provided that in all events MP shall not have the right to sell any such Cooling Accessories and other products after the two-year anniversary of the effective date of such termination, provided, however, that in the event of a termination pursuant to Section 3(i) above, CC shall have no further obligation to ship any Cooling Accessories or other products to MP under any PO provided however that if MP has fully paid for all undisputed amounts currently due under a PO (i.e., due in accordance with the timing set forth in Section 16 below) CC shall nevertheless perform its obligations under such PO. In addition, notwithstanding any termination of this Agreement MP shall have the right to purchase, distribute and sell Cooling Accessories and other products hereunder to the extent necessary to permit MP to continue to fulfill its obligations pursuant to orders from its customers that are in effect and outstanding as of the effective date of expiration or termination (for any reason) of this Agreement, provided that in all events MP shall not have the right to purchase, distribute or sell any such Cooling Accessories and other cooling products after the two-year anniversary of the effective date of such termination, provided further, however, that in the event of a termination pursuant to Section 3(i) above, CC shall have no further obligation to ship any Cooling Accessories or other products to MP under any PO provided however that if MP has

fully paid for all undisputed amounts currently due under a PO CC shall nevertheless perform its obligations under such PO. The period of time following the effective date of termination during which MP exercises its rights under this Section 4 shall be referred to as the "Wind-Down Period."

5) **Product Exclusivity:**

In the Exclusive Territory, CC agrees it will not license or sell the Cooling Accessories (including any Cooling Accessory Derivatives thereof) that are designated as exclusive on Exhibit A or otherwise mutually agreed in writing to be "Exclusive Cooling Accessories" (collectively, the "Exclusive Cooling Accessories") to anyone other than MP during the Term, with the understanding that, to the extent expressly provided in Exhibit B or otherwise expressly agreed in writing by the parties, CC has the right to sell the Cooling Accessories that are not "Exclusive Cooling Accessories" ("Non-Exclusive Cooling Accessories") to vertically integrated companies as well as customers that are not Sports Distributors or retailers in the Sporting Channel for private label or CC-labeled versions of the Cooling Accessories. MP shall have a right of first notice and refusal to distribute any Cooling Accessory Derivatives and New Products developed by CC as provided for under Section 13. Following written notification by CC of such Cooling Accessory Derivatives and New Products, MP will have forty-five (45) days to provide the terms under which it wishes to distribute such Cooling Accessory Derivatives and New Prod-

ucts. Any New Product that does not have the same function as an Exclusive Cooling Accessory shall be treated as a Non-Exclusive Cooling Accessory unless the parties mutually agree in writing to add it to the list of Exclusive Cooling Accessories. If MP declines to make a good faith offer to distribute such Cooling Accessory Derivatives or New Products within such 45-day period, CC shall thereafter be free (subject to all the limitations in Section 6, including without limitation, the restrictions on sale in the Sporting Channel) to sell such Cooling Accessory Derivative or New Products to any third party in any territory or country; provided that such Cooling Accessory is not of comparable size and shape or function to any Exclusive Cooling Accessory (For example, CC would not be permitted to sell any Cooling Accessory Derivative, New Product or any other cooling product that functions as a towel, regardless of the size or shape of such product). If MP declines to make such a good faith offer, it shall not thereafter manufacture or have manufactured for it such Cooling Accessory Derivative or New Product without first providing CC with 45 days notice of the terms under which it proposes to have such Cooling Accessory Derivative or New Product manufactured and the opportunity for CC to match the terms under which MP is proposing to have such Cooling Accessory Derivative or New Product manufactured and (i) if CC agrees to match such terms in such 45 day period such Cooling Accessory Derivative or New Product shall be treated as a Cooling Accessory Derivative for all purposes hereunder and (ii) if CC

does not agree to match such terms in such 45 day period and such Cooling Accessory Derivative or New Product is a woven product (as opposed to a knitted product) MP shall not be subject to the sourcing obligations under Section 14 with respect to such Cooling Accessory Derivative or New Product. If MP does make such a good faith offer within such 45-day period, CC shall consider MP's offer in good faith but will not be obligated to accept such offer; provided that if CC does not accept MP's good faith offer it shall notify MP of any third party offer subsequently received to distribute such Cooling Accessory Derivatives or New Products and shall provide MP with a 45-day period in which to match any third party offer for such Cooling Accessory Derivatives or New Products and MP's offer shall be deemed accepted by CC if it matches the third party offer. Should MP's offer be accepted pursuant to the foregoing, then the applicable Cooling Accessory Derivative or New Product will become a Cooling Accessory hereunder for all applicable channels and this Agreement shall be amended to reflect the terms of such offer.

6) **Distribution Exclusivity and Collaboration:**

a) In the U.S. and elsewhere in the Exclusive Territory, CC agrees it will not sell any Cooling Accessories, New Products or Cooling Accessory Derivatives, directly or indirectly, through an agent or otherwise, to any retailer or other entity in the "Sporting Channel" (as such term is hereinafter defined) throughout the Term except in compliance with the following provisions of this Section 6. In addition,

both parties agree to use commercially reasonable efforts in good faith to finalize the structure, commission, plan and process associated with MP's representation of CC-branded apparel products to sporting goods and sport specialty retailers ("Sporting Channel"). So long as the parties have used such efforts, the failure to finalize same shall not constitute a breach hereof. For the avoidance of doubt, it is expressly understood that a retailer will be deemed within the Sporting Channel if fifty percent (50%) or more of such retailer's annual revenue is derived from sports and sporting goods supplies, including without limitation, any sports-related footwear (provided, however, that if the parties are unable to determine the actual revenues of an entity, reference shall be made the applicable percentage of its product catalogue offerings) and any retailer that qualifies as being within, or outside, the Sporting Channel as of the first day on which the initial sell-in period for an applicable product commences shall be grandfathered as such for the balance of the Term. CC agrees and acknowledges that no New Product, Cooling Accessory, Cooling Accessory Derivative or other cooling product will be directly or indirectly sold or distributed by CC or any agent or contractor of CC to any retailer or other entity in the Sporting Channel in the Exclusive Territory including sporting goods and sporting specialty retailer; provided, however that (so long as any apparel and Dr Cool products are not of comparable size and shape or function to the Exclusive Cooling Accessories) the foregoing restrictions shall apply with respect to apparel

and Dr Cool products only during the Restricted Period. The "Restricted Period" shall mean, with respect to Dr Cool products, the 6-month period following the date on which CC notifies MP in writing that the first such CC Dr Cool product is ready for shipping to retail distribution and, with respect to cooling products in the apparel category, the 12-month period following the date that CC notifies MP in writing that its first such cooling apparel product is ready for shipping to retail distribution. Following any such notice from CC, the parties shall work in good faith to agree upon reasonable, mutually acceptable sales success criteria, which must be established no later than sixty (60) days prior to the date on which such products are in stock and ready for shipment to retailers. Once the parties agree upon such mutually acceptable sales success criteria this Agreement shall be amended to reflect the terms of such agreement. If, following the exercise of such good faith efforts, the parties are unable to agree upon such mutually acceptable sales success criteria within such 60 day period, CC shall be free (following the mandatory 6 or 12 month Restrictive Period specified above, which shall apply regardless of whether the parties reach mutually acceptable sales criteria) to sell such products to Sporting Channel entities without restriction under this Section 6(a) provided that if MP disputes in good faith whether CC actually exercised such good faith efforts and initiates a Dispute Resolution process as set forth below, CC's right to do so shall be suspended until the resolution of such process. If the agreed upon criteria are met by MP during

the initial 6 (in the case of Dr Cool Products) and 12 (in the case of other cooling products) months of the Restricted Period (or during any extension of the Restricted Period), the Restricted Period shall be extended for an additional 6 or 12 months (as applicable). For the avoidance of doubt, the parties agree and acknowledge that the Restricted Periods may or may not run concurrently (due to different launch dates) and the extension of the Restricted Period for cooling products and in the apparel category and Dr Cool products shall be considered independently, making it possible for the Restricted Period to be extended for one without extending the other.

b) The parties agree to use commercially reasonable efforts during the first 60-90 days of the Term to devise a mutually agreeable distribution and sales strategy for the Running Specialty Channel that specifically addresses CC apparel/socks and MP/CC baselayer and socks. Specific topics to be discussed include distribution, segmentation, and rollout/launches within the Running Specialty Channel and the Sporting Goods Channel. The Running Specialty Channel is defined as retail stores with at least 95% of sales to runners. Provided that the parties use such efforts, the failure to agree upon such a strategy shall not constitute a breach of the terms hereof.

c) In addition to and without limiting the other exclusivity requirements hereunder, it is expressly agreed that MP will have exclusivity with respect to all Cooling Accessories (including Cooling Accessory Derivatives and New

Products) and other cooling products sold to or through: Lowe's Home Improvement, Home Depot, QVC, HSN, Shop NBC and Direct Response subject to the following provisions of this Section 6(c). For further clarity, neither CC nor its affiliates will be permitted to sell cooling products (including Cooling Accessories and New Products) (during the period of the Term in which MP has any exclusivity rights under Sections 5 and 6 hereof) to any of the foregoing retailers or their affiliates other than through MP. Notwithstanding the foregoing, it is agreed that CC's exclusivity obligations under this Section 6(c) shall expire with respect to Dr Cool Products (so long as the Dr Cool Products are not of comparable size and shape or function to the Exclusive Cooling Accessories) 12 months following the date on which CC notifies MP in writing that the first such Dr Cool Product is ready for shipping to retail distribution and, with respect to CC's cooling products in the apparel category (so long as the cooling products are not of comparable size and shape or function to the Exclusive Cooling Accessories), the 12 months following the date that CC notifies MP in writing that its first such cooling apparel product is ready for shipping to retail distribution. Following any such notice from CC, the parties shall work in good faith to agree upon reasonable, mutually acceptable sales success criteria, which must be established no later than sixty (60) days prior to the date on which such products are in stock and ready for shipment to retailers. Once the parties agree upon such mutually acceptable sales success criteria this Agreement shall be

amended to reflect the terms of such agreement. If, following the exercise of such good faith efforts, the parties are unable to agree upon such mutually acceptable sales success criteria within such 60 day period, CC shall be free (following the mandatory 12 month exclusive period specified above, which shall apply regardless of whether the parties reach mutually acceptable sales criteria) to sell those specific products (i.e., products with respect to which the parties have failed to agree upon acceptable sales success criteria) to those entities that are restricted under this Section 6(c) without restriction provided that if MP disputes in good faith whether CC actually exercised such good faith efforts and initiates a Dispute Resolution process as set forth below, CC's right to do so shall be suspended until the resolution of such process. If such criteria are met by MP, the exclusivity periods specified in this paragraph sentence shall be extended for additional 12-months periods, it being understood that such extensions shall be considered independently for CC's cooling products in the apparel category and the Dr Cool products.

7) **Cooperation and Further Assurances:**

CC agrees that (i) it shall take no actions to directly or indirectly frustrate its exclusivity obligations hereunder; (ii) CC shall fully cooperate with MP to ensure that no third parties take any actions that frustrate the purposes of the exclusivity provisions herein, and (iii) CC shall take such actions as are necessary to enforce CC's intellectual property rights and contractual rights against third parties. For the

avoidance of doubt, CC represents and warrants that it has the right to enter into this Agreement and that it is not subject to any agreement with any other party that conflicts with CC's obligations hereunder or which would otherwise frustrate the purposes of this Agreement. Without limiting the foregoing, CC represents and warrants that any agreement CC previously has executed with Grabber (or its affiliates) has been terminated and Grabber and its affiliates have no further rights to sell or distribute additional inventory or fulfill any product orders for any products supplied directly or indirectly by or through CC or its affiliates. CC further agrees to take all actions necessary to ensure that its affiliates and any other related entities or representatives are bound by and will adhere to the terms of this Agreement.

8) **Minimum Guarantees/Forecasts/Co-op:**

MP's product exclusivity rights as delineated in Sections 5 and 6 above (the "MP Exclusivity") will continue throughout the Term subject the following requirements (and the termination rights herein) but may be terminated (as provided below) if MP fails to comply with such requirements. For the avoidance of doubt, once terminated, MP's exclusivity rights under this Agreement shall not be restored without an express written agreement of the parties to that effect:

a) MP's combined purchases (of any kind, regardless of product type, price, branding, or other characteristics) from CC must ex-

ceed 2,100,000 units by 12/31/2014, of which no fewer than 625,000 units must be purchased no later than 3/1/2014 ("Initial Minimums"). Subject to MP achieving the Initial Minimums, MP shall be entitled to the MP Exclusivity throughout the Initial Term. MP further agrees that of the initial 2,100,000 units to be purchased by MP, no fewer than 500,000 units will be woven style (as opposed to knit style).

b) For any Renewal Term MP may (as provided below) lose the MP Exclusivity if during the prior Contract Year it purchases less than $10 Million in CC products (the "Continuing Minimums").

c) If MP does not meet the Initial Minimums or Continuing Minimums (collectively, the "Minimums"), CC will continue to produce Cooling Accessories for MP on a non-exclusive basis. (For the avoidance of doubt and without limiting the MP Exclusivity, it is expressly understood that MP shall always maintain, during the Term hereof and the Wind-Down Period, the non-exclusive worldwide right and license to distribute, sell and otherwise exploit the Cooling Accessories and Cooling Accessory Derivatives for which the MP Exclusivity does not apply (or does not apply in an applicable territory, subject only to any CC branding restrictions under the ReYs Agreement). Other than the loss of MP Exclusivity, there shall be no penalty (and MP shall not be deemed in breach of the Agreement) due to any failure to meet the

Continuing Minimums. In the event that CC believes that MP has not met the Initial Minimums or the Continuing Minimums, CC shall immediately provide written notice of such alleged failure to MP and MP shall have the right to dispute any alleged failure. Any actual failure to meet the Initial Minimums may be deemed a material breach of the Agreement by MP, unless MP agrees to purchase units equal to any such shortfall (i.e., the difference between the Initial Minimums and the actual units purchased) within 30 days of written notice of such breach. For further clarity, in no event will MP lose the MP Exclusivity, be deemed in breach or be deemed to have failed to have met the Minimums in the event that MP is unable to satisfy the Minimums due to an act or omission of CC or its agents, contractors or suppliers. Further, CC and MP mutually agree that MP's obligations with respect to the Minimums are contingent upon timely delivery of all products ordered by MP. If CC or its agents cannot deliver or cannot deliver on a timely basis, MP shall not lose the MP Exclusivity and (without limiting MP's other rights and remedies) the Minimums will be adjusted and/or renegotiated accordingly.

d) Prior to May 1 in any Contract Year, MP will (following written request from CC) provide CC with a good faith estimate of MP's contemplated purchases of Cooling Accessories during the next two Contract Years and prior to the end of the then-

current calendar year, shall submit a PO for not less than 30% of the forecasted purchases for the next Contract Year. MP further agrees to make good faith efforts to work with CC during the first 90 days of the Term to create a preliminary forecast for MP's total woven style purchases over the first two Contract Years.

e) In the event that MP purchases more than $12 Million in CC products during any Contract Year, CC will contribute 5% of the amount purchased by MP in such Contract Year towards a mutually agreed co-op marketing program. For clarity, such amounts shall be contributed and spent in a mutually agreed manner prior to the end of the following Contract Year.

9) **Supply, Production and Inspection:**

a) CC and MP shall comply with each purchase order ("PO") submitted by MP, and in this connection CC shall make arrangements to secure a timely delivery no later than one-hundred twenty (120) days after receipt of MP's PO or such other period may be agreed by the parties. Unless otherwise agreed in writing with specific reference to the agreed upon clauses being changed, PO's shall be in the form of Exhibit C hereto. CC shall take all necessary steps, in accordance with MP's requirements, to ensure an uninterrupted supply of Cooling Accessories and other products to MP, and shall use its commercially reasonable good faith efforts to provide the

products to MP in a timely manner, without delay, interruption or slow-downs. Except as otherwise expressly agreed by the parties, Cooling Accessories and other products shall be delivered to MP in finished form, fit for sale to consumers. CC shall notify MP in writing no less than ninety (90) days in advance of any anticipated delays in production and/or shipping that may impact any product's availability, delivery, quantity and/or quality. CC shall also notify MP no less than one-hundred twenty (120) days in advance of any proposed changes in Cooling Accessories or other products that would materially alter the nature, quality, durability, size, composition, style, performance, functionality or character of such products, it being understood that such changes shall not be made without MP's prior written approval. Moreover, upon notice of the proposed change, and without limiting MP rights under any applicable cancellation provisions, MP will have the right to cancel the subject PO without recourse to CC, notwithstanding any other provision to the contrary. In addition, CC shall provide MP at least sixty (60) days prior written notice of any proposed changes in CC's premises or any premises used in the production, supply and/or distribution of Cooling Accessories or other products after the Effective Date.

b) MP and its agents shall have the authority to enter upon CC's premises or any premises used in the production, supply or dis-

tribution of Cooling Accessories or other products purchased hereunder for the purposes of inspection for determining compliance with the terms of this Agreement. This right to inspection may only be exercised twice per Contract Year and upon 30 days prior written notice and includes, but is not limited to, the right to inspect the workforce, employee records, equipment, production runs or the procedures used by CC in manufacturing or having manufactured products to assure compliance with CC's obligations under this Agreement or any pertinent laws, orders or decrees applicable to CC, MP, MP customers and any product. In the event that CC is not in complete control of the premises in question, CC agrees that it will obtain all necessary and proper consents that will allow MP and its agents to exercise the rights set forth in this paragraph. CC will produce such consents upon request by MP or its agents. Neither inspection by MP nor the lack of any such inspection shall alleviate CC's obligation to comply with all applicable laws and standards, orders or decrees or be viewed as MP acquiescence to any non-compliance by CC. Without limiting the foregoing, upon MP's request, CC will promptly provide all applicable Export Administration Regulation product classifications and supporting documentation for the Products, including, without limitation: Certificates of Origin (General Use, NAFTA, and/or other trade agreement(s)), Export Control Classification Numbers

("ECCN's"), U.S. Customs Classification number, export license information, and "Schedule B" (export) and Harmonized Tariff Schedule (import) codes.

10) Pricing:

a) CC agrees to provide MP with Finished Goods pricing as found in Exhibit D, it being understood that Exhibit D shall be completed and updated as soon as possible (and in no event later than 30 days) following the Effective Date. In particular, CC will provide pricing with respect to the "TBD" items on Exhibit D - i.e., the baselayer shirt, socks, wristbands, body towels, medium towels and yoga mat—within 30 days (in the case of towels) and 90 days (in the case of baselayer shirts, socks, wristbands and yoga mats) of the date this Agreement has been executed by both parties. Further, CC agrees that in addition to the pricing already provided for Finished Goods with secondary packaging FOB NJ, pricing will be provided for all remaining columns on Exhibit D, i.e. Finished Goods with secondary packaging FOB China, and pricing without secondary packaging (both FOB NJ and FOB China), which pricing shall be less than the corresponding pricing on Exhibit D with secondary packaging and shall reflect a deduction of the actual costs incurred by CC in connection with the secondary packaging. For clarity, following the Effective Date, any changes to the SRP will not affect the pricing paid to CC hereunder, which shall continue to be based

on the figures in Exhibit D (as completed and updated pursuant to the terms of this paragraph). "Finished Goods" means that the applicable Cooling Accessory contains all attributes that are necessary to enable such Cooling Accessory to be completely ready for sale to end consumer, including all the components, primary and secondary packaging, shippers, packers and final pack-out of the Cooling Accessory in each case as specified by MP, including without limitation, as indicated in the applicable PO term. The parties expressly agree to review the pricing set forth in Exhibit D at the end of the Initial Term and at the end of each Renewal Term and in good faith consider appropriate price increases based on increases in the costs of raw materials and based on changes in market dynamics.

b) As between MP and CC, any and all taxes, fees, imports or stamps required to be paid or collected under the laws of any local, state, federal or foreign jurisdiction, whether in the United States or any foreign country, relating to the manufacture, distribution, sale or export of products, other than taxes based on MP income or the retail sale of products by MP to its customers, shall be the responsibility of, and promptly paid or remitted by, CC to the appropriate governmental authority. In the case of products (if any) that are imported by entities other than MP, CC shall be responsible for and shall pay any U.S. excise taxes relating to the manufacture,

storage, use, and sale of the products by CC.

c) At no time during the Term of this Agreement shall CC sell Cooling Accessories provided hereunder to any entity on terms more favorable than those offered and/or otherwise made available to MP, including, without limitation, with respect to the applicable price and payment terms, program support, growth or sales initiatives, warranties, allowances, rebates, co-op advertising and incentives, provided that the foregoing restriction shall only apply to entities purchasing comparable amounts (or less) of the applicable Cooling Accessories. If, at any time during the Term of this Agreement, CC sells any Cooling Accessories to an entity other than MP on terms that are more favorable than those offered and/or otherwise made available to MP in violation of the terms of the foregoing sentence (a "Triggering Event"), CC shall immediately (a) notify MP and (b) enter into an amendment to the applicable PO(s) and, if applicable, this Agreement, to provide MP with terms that are at least as favorable as such other terms. Such amendment(s) shall apply to all purchase POs, effective as of the date of the Triggering Event.

11) Branding and Testing Procedures:

a) MP agrees to use commercially reasonable efforts to include CC branding on primary, secondary and merchandising of Cooling

Accessories within MP, irrespective of source for the Cooling Accessories, but dependent on lead times and mutual agreement by both parties. Exact placement, size and treatment of the CC branding will be mutually agreed upon, but shall be substantially similar to the CC branding depicted on Exhibit E, unless otherwise agreed in writing by the parties. Both parties agree to work together on determining the appropriate branding for cooling accessories manufactured at the MP factory, it being understood that the parties will use all reasonable efforts to reach agreement on such branding within the first 15 days of the Term. For the avoidance of doubt and notwithstanding any other provision herein to the contrary, once MP obtains CC's written approval on use of CC trademarks and other branding elements on any products or materials further approval shall not be required with respect to any products or usages that are similar to those approved previously. For clarity, it is expressly understood that notwithstanding any other provision herein to the contrary, MP shall have the right in its sole discretion to determine which, if any, of its Marks (as defined below) are used in connection with branding, selling, distributing or otherwise exploiting the Cooling Accessories and whether any third party Marks will be used in connection with the Cooling Accessories. The requirements under this paragraph shall expire upon the one-year anni-

versary of either party's issuance of any notice to terminate without cause.

b) In the event that MP requires approval testing of Cooling Accessories or Cooling Accessory Derivatives in addition to those tests that CC would normally perform on its own behalf, CC shall pay for such additional testing to the extent that it involves wear testing or substantiation of cooling claims that CC has made for such products, it being understood that CC must provide it least one substantiated wear claim and one substantiated cooling claim. All other testing requested by MP shall be paid for by MP.

12) Marketing:

Following the Effective Date, MP agrees to use commercially reasonable efforts to include CC branding on substantially all new cooling-specific merchandising signage and fixtures for 2013 and throughout the Term to be presented in a consistent manner with the branding found on the MP packaging. The requirements under this paragraph shall expire upon the one-year anniversary of either party's issuance of any notice to terminate without cause.

13) New Product Development:

CC agrees to use commercially reasonable efforts to launch no fewer than 3 new products per Contract Year as Cooling Accessory Derivatives that are substantially distinct from those set forth on Exhibit A ("New Products"), as well as introduce no fewer than 2 new colors

per Contract Year for all existing Cooling Accessories from the prior year portfolio ("Cooling Accessory Derivatives"). For clarity, in the event that MP and CC launch more than 3 New Products that were proposed by CC in a Contract Year, then CC's obligations to present and launch New Products in the following Contract Year shall be reduced in a corresponding manner (i.e., if the parties launch 4 New Products in a Contract Year, CC's obligation will be to launch no fewer than 2 New Products in the next Contract Year). CC agrees to use commercially reasonable efforts to update existing Cooling Accessories every 3 years. For the avoidance of doubt, the baselayer shirt, socks and yoga mat will serve as the three New Products for the first Contract Year.

14) **Sourcing:**

CC and MP acknowledge and agree that MP will continue to obtain certain cooling products from its own sources during the Term. Notwithstanding the foregoing, MP agrees that it will purchase no less than the following percentages (based on units) of its non-chemical, textile-based woven products from CC sources for distribution within the Exclusive Territory, unless additional purchases from MP sources are necessary due to demand exceeding supply available from CC's factory: 35% in 2014 and 50% in 2015 and thereafter. MP further agrees not to source or buy any of the Cooling Accessories provided by CC hereunder (or Cooling Accessories that are substantially similar in shape or size) whether from MP's factory or from any other source, except for (i) its current

non-chemical, textile based woven products MP currently buys from such factory and (ii) any woven products that MP has in development as of the Effective Date as listed on Exhibit B hereto. Notwithstanding the foregoing, the sourcing restrictions in this Section shall not apply (a) during any Contract Year in which CC or MP has issued a notice of termination hereunder or any Contract Year thereafter, and (b) during all Contract Years following any Contract Year during which CC was unable to fulfill a material number of units of Cooling Accessories under any MP PO or (c) to any new woven products or customized versions of existing woven Cooling Accessories that are proposed by MP and as to which MP has provided CC with not less than 45 days notice of the terms under which MP's factory or any other factory is willing to manufacture such woven product and CC has declined to match such terms within such 45 day period. Further, both parties agree to use commercially reasonable good faith efforts to have MP or its sourcing agent request that CC raw material be purchased by MP factory for annual runs of appropriate Cooling Accessories and, most specifically, MP's non-chemical, textile-based woven products, in Contract Year 2 (i.e. calendar 2014 deliveries) and thereafter. For the avoidance of doubt, CC acknowledges that MP utilizes the services of a sourcing agent in China and CC agrees to use commercially reasonable efforts to cooperate with MP's sourcing agent to effectuate the purposes of this Agreement, including without limitation by providing MP's sourcing agent with access to facilities and records in

China. CC understands and agrees that MP's arrangement with MP's sourcing agent is exclusive and CC will honor the exclusive nature of that relationship. Further, CC shall have the right (not more often than once per Contract Year) and upon not less than 30 days prior written notice to inspect the relevant books and records of MP to verify compliance with the terms of this Section 14 relating to sourcing by MP only. Notwithstanding the foregoing, if MP terminates this Agreement without cause, MP agrees that in the 12 months following MP's issuance of such a termination notice, MP will purchase no less than 66% of its knit Cooling Accessories distributed within the Exclusive Territory from CC sources, unless additional purchases from MP sources are necessary due to demand exceeding supply available from CC's factory; provided that this sourcing requirement will 1) only apply during the 12-month period following notice of termination by MP without cause and not thereafter and 2) will apply only to the extent that during the 12 months prior to receipt of the termination notice, CC was able to supply all Cooling Accessories ordered by Mission (which orders were accepted by CC) in a timely manner and in accordance with this Agreement and applicable POs.

15) **Intellectual Property:**

a) For purposes of this Agreement "Intellectual Property Right and Intellectual Property Rights" means (a) all copyright rights under the copyright laws of the United States and all other countries for the full

term thereof (and including all rights accruing by virtue of bilateral or international copyright treaties and conventions), whether registered or unregistered, including, but not limited to, all renewals, extensions, reversions or restorations of copyrights now or hereafter provided for by law and all rights to make applications for copyright registrations and recordations, regardless of the medium of fixation or means of expression; (b) all rights to and under all new and useful, patentable and unpatentable inventions, discoveries, designs, technology and art, including, but not limited to, all improvements thereof and all know-how related thereto, including all letters patent and patent applications in the United States and all other countries (and all letters patent that issue therefrom) and all reissues, reexaminations, extensions, renewals, divisions and continuations (including continuations-in-part and continuing prosecution applications) thereof, for the full term thereof; (c) all statutory and common law trademark and service mark rights and the goodwill associated therewith, and all applications and registrations to issue therefrom under all intellectual property laws of the United States, each U.S. state, and all other countries for the full term and any renewals thereof ("Marks"); (d) Internet domain names and applications therefor and URLs ("Domain Names"); (e) electronic or other databases to the extent protected by intellectual property or other law in any jurisdiction;

(f) all trade secrets; (g) all Confidential Information; (h) know-how; and (i) all worldwide intellectual property rights, industrial property rights, proprietary rights and common law rights, whether registered or unregistered, not otherwise included in the foregoing, including, without limitation, all trade dress, algorithms, concepts, processes, methods and protocols.

b) "CC Property" shall be defined as all products (including without limitation the Cooling Accessories), personal products, inventions, designs, discoveries, improvements, innovations, ideas, drawings, images, works of authorship, formulas, methods, techniques, concepts, configurations, compositions of matter, packaging, labeling, software applications, databases, computer programs as well as other creative content, methodologies and materials in existence prior to this Agreement (or created outside the scope of this Agreement) or developed or provided by CC hereunder and all Intellectual Property Rights with respect to any of the foregoing, excluding any materials provided by MP. It is understood and agreed that CC shall be under no obligation to share with or provide to MP any CC Property except as specifically called for under this Agreement. Excluding those elements of the CC Property consisting of Marks, Domain Names, CC hereby grants MP and its agents and contractors a non-exclusive, irrevocable, royalty-free, fully paid-up, perpetual, worldwide, fully-

transferable license, with the right to sublicense (through multiple tiers), use, reproduce, modify, and create derivative work based on and otherwise freely exploit the CC Property in any manner for the benefit of MP, its licensees and other third parties (collectively "MP Licensees"). Excluding those elements of the CC Property consisting of Marks or Domain Names or any claims relating thereto but without otherwise limiting the foregoing, (i) MP will have the right to use for any and all purposes the CC Property, including any ideas, methods, techniques, materials and information, including any Intellectual Property Rights therein, provided to or otherwise obtained by MP as a result of this Agreement, without restriction, liability or obligation and (ii) CC hereby releases MP Licensees from all claims based on CC's patent, copyright, trade dress or other Intellectual Property Rights that arose prior to this Agreement (including, notwithstanding any provision herein to the contrary, any claims relating to Marks that arose prior to this Agreement) or that arise during or after the term of this Agreement.

c) "MP Property" shall be defined as all products, personal products, inventions, designs, discoveries, improvements, innovations, ideas, drawings, images, works of authorship, formulas, methods, techniques, concepts, configurations, compositions of matter, packaging, labeling, software applications, databases, computer programs

as well as other creative content, methodologies and materials in existence prior to this Agreement (or created outside the scope of this Agreement) or developed or provided by MP hereunder and all Intellectual Property Rights with respect to any of the foregoing, excluding any materials provided by CC. It is understood and agreed that MP shall be under no obligation to share with or provide to CC any MP Property except as specifically called for under this Agreement. Excluding those elements of the MP Property consisting of Marks or Domain Names or any MP Property relating to any MP athletes or other talent or third party or any claims relating to any of the foregoing, (i) CC will have the right to use for any and all purposes relating to cooling products the MP Property, including any ideas, methods, techniques, materials and information and any Intellectual Property Rights therein, provided to or otherwise obtained by CC as a result of this Agreement, without restriction, liability or obligation and (ii) MP hereby releases CC Licensees from all claims based on MP's patent, copyright, trade dress or other Intellectual Property Rights that arose prior to this Agreement or, to the extent within the scope of the licenses granted herein, that arise during or after the term of this Agreement. Further, and notwithstanding anything to the contrary set forth in this Agreement, in the event of a termination of this Agreement pursuant to Section 3(i) or (ii) CC shall negotiate in good

faith with MP (for a period of not less than 90 days following any such termination) with respect to the disposition (including sale to MP or destruction) of any products that MP had ordered and that CC had manufactured. If, following such 90 day period, the parties have been unable to mutually agree upon the disposition of such products, then for a period of 6 months thereafter, CC shall have the right, using the MP Property (as previously affixed to or integrated in the products), to dispose of any products that MP had ordered and that CC had manufactured anywhere to anyone.

d) During the Term of this Agreement and the Wind-Down Period, CC grants to MP a non-exclusive, non-transferable, limited license, which shall expire upon the termination of this Agreement except as necessary to allow either party to exercise its rights during the Wind-Down Period, to use its Coolcore trademark and logo (as well as any other Marks licensed hereunder) for the limited purpose of performing its obligations hereunder, exercising its rights and promoting the purposes of this Agreement as contemplated herein, in each instance so long as not done by MP in a (i) disparaging or inaccurate manner or (ii) manner which is inconsistent with the terms of this Agreement. MP shall comply with any written trademark guidelines that CC provides in writing in advance. In addition, each party shall have the right to review and approve all uses of its Marks by the

other party, except for those pre-approved uses by MP as specified above. Neither party will create a unitary composite mark involving a Mark of the other party without the prior written approval of the other party. Each party will display trademark symbols and proprietary notices in connection with its use of the other party's Marks in connection with this Agreement as may be reasonably requested and provided by the other party. Each party acknowledges the other party's right, title, and interest in and to its Marks and agrees that all use of the other party's Marks in connection with this Agreement will inure to the benefit, and be on behalf, of the other party and neither party shall attempt to register or otherwise cancel, interfere, or contest the other party's rights in and to its intellectual property and trademarks. For avoidance of doubt, each party acknowledges that its use of the other party's Marks will not create in it, nor will it represent that it has, any right, title, or interest in or to such Marks other than the limited licenses expressly granted herein. Except as otherwise agreed, the rights granted to MP under this paragraph are granted on a worldwide, provided that MP shall not have the right to use CC's Marks in any jurisdiction within the ReYs Territory. Notwithstanding any other provision herein, the rights granted to MP under this Section shall continue throughout the Wind Down Period.

e) It is not the parties' intention to create any jointly owned Intellectual Property Rights hereunder. Rather, the parties intend that all Intellectual Property Rights should be categorized as either MP Property or CC Property and licensed pursuant to the terms herein.

f) Each party agrees to execute or cause its agents and/or employees to execute any documents necessary or desirable to secure or perfect the other party's legal rights and worldwide ownership in such other party's Intellectual Property Rights (e.g., the CC Property in the case of CC and the MP Property in the case of MP), including, but not limited to documents relating to patent, trademark and copyright applications, transfers or assignments.

g) During the Term, MP agrees that it shall not (nor will it direct any of its agents to) attempt to reverse engineer any trade secret information relating to the proprietary chemical compositions or proprietary product weaves of CC Cooling Accessories; provided that the foregoing restriction shall not apply during any Contract Year (or for any period of time thereafter): (i) in which either party has issued a notice of termination hereunder or (ii) in which total purchases by MP of Cooling Accessories hereunder has declined from the prior Contract Year. For the avoidance of doubt, CC recognizes that MP may require information regarding the chemical composition or proprietary product weaves of CC prod-

ucts, including without limitation, due to retailer or regulatory inquiries, and CC shall fully cooperate in providing such information upon MP's request.

16) Payment Terms:

Unless otherwise agreed in writing, during the first 6 months of the Term payment terms are as follows: 15% upon issuance of a PO by MP, 20% upon shipping from China port (or other mutually agreed port) and 65% net 30 from arrival at US port. For the remainder of the Term (including any Wind Down Period) payment terms are as follows: 10% upon issuance of a PO by MP, 15% upon shipping from China port (or other mutually agreed port) and 50% net 30 from arrival at US port and 25% net 60 from arrival at US port. All percentages are calculated based on the total amount of the corresponding PO.

17) Expenses:

Each party shall be responsible for their own expenses incurred in connection with this transaction.

18) Restrictive Covenants:

Each party acknowledges that the other party's employees, sourcing agents and sources of supply (collectively, "Restricted Parties") are a valuable assets of such party. Accordingly, each party agrees that during the period of time dating from the Effective Date through two (2) years after the effective date of termination of this Agreement, such party shall not, directly or indirectly, recruit or solicit, or em-

ploy, engage as a consultant or supplier, or otherwise retain, any of the other party's Restricted Parties who are involved in the performance of this Agreement. Each party agrees that the other party's remedy at law for a breach of this Section shall be inadequate and therefore the non-breaching party shall be entitled to injunctive relief for such breach, without proof of irreparable injury and without posting bond, in addition to any other right or remedy it may have.

19) Equity Participation:

In addition to the other consideration provided to CC under this Agreement, CC will receive a warrant to purchase common shares of MP in the form attached hereto as Exhibit F (the "Warrant"). The exercise of such Warrant will not terminate or otherwise affect CC's obligations hereunder.

20) Representations/Warranties and Indemnities:

a) Each party represents and warrants to the other party that: (i) it has sufficient expertise and experience to perform its obligations hereunder; (ii) it has the full corporate right, power and authority to enter into this Agreement and to perform the acts required of it hereunder; and (iii) the execution of this Agreement and the performance of its obligations hereunder, do not and will not violate any agreement to which it is a party or by which it is bound.

b) CC further represents and warrants to MP that: (i) all information CC provides to MP

is and will be true and correct, including without limitation all testing and substantiation relating to its products and product claims; (ii) CC's entering into this Agreement and the performance of CC's obligations hereunder will not conflict with or be prohibited or restricted by any agreements or commitments with third parties (iii) title to Cooling Accessories and other products delivered to MP or its designees will be free of all liens, claims, debts, and rights of third parties; (iv) the Cooling Accessories and other products delivered to MP or its designees will be genuine and not adulterated, misbranded, or mislabeled; (v) the Cooling Accessories and other products delivered will not infringe upon any Intellectual Property Rights (as defined above), and CC is the owner of, or is licensed to authorize MP to use, all Intellectual Property Rights associated with the Cooling Accessories and other products delivered; (vi) the Cooling Accessories and other products delivered will not be subject to any import quota, restriction, rule or regulation preventing the importation or sale of the same or any component thereof, (vii) the Cooling Accessories and other products delivered will be new and not used, remanufactured, or reconditioned (unless otherwise stated in the PO), of consistent kind and quality, and free from all defects in material and workmanship (provided that MP shall notify CC within 30 days after receipt if it determines that any product is defective); (viii) the Cooling Accessories and other

products delivered will be safe and appropriate for the purpose for which goods of that kind are normally used; (ix) the Cooling Accessories and other products delivered and all materials provided to MP in connection with the marketing, promotion, distribution, and sale of the same, including, without limitation, packaging, labeling, and advertising materials for such Cooling Accessories and other products delivered, have been produced in compliance with all applicable federal, state and local laws, regulations, rules, guidelines, ordinances and standards as well as all retailer requirements (collectively "Requirements") in all locations throughout the "Territory" (as defined below), and neither the Cooling Accessories or other products delivered to MP nor their purchase or sale by MP will violate or fail to meet any such Requirements; and (x) the Cooling Accessories and other products delivered may be re-sold by MP and its affiliates in any location in which MP has the right under this Agreement to market, sell, or distribute such goods (the "Territory"). EXCEPT AS SET FORTH HEREIN, THERE ARE NO WARRANTIES, EXPRESS OR IMPLIED, WITH RESPECT TO CC's PRODUCTS AND CC EXPRESSLY EXCLUDES AND DISCLAIMS ANY IMPLIED WARRANTY OF MERCHANTABILITY AND ANY WARRANTIES OF FITNESS FOR A PARTICULAR PURPOSE, APPLICATION OR USE. EXCLUDING ITS

INDEMNITY OBLIGATIONS, GROSS NEGLIGENCE, INTENTIONAL MISCONDUCT AND MATTERS WITHIN THE SCOPE AND MONETARY LIMITATIONS OF ANY INSURANCE COVERAGE REQUIRED HEREUNDER, UNDER NO CIRCUMSTANCES WILL EITHER PARTY BE LIABLE FOR SPECIAL, INCIDENTAL OR CONSEQUENTIAL DAMAGES, WHETHER SUCH DAMAGES ARE SOUGHT IN CONTRACT, IN TORT (INCLUDING BUT NOT LIMITED TO NEGLIGENCE AND STRICT LIABILITY) OR OTHERWISE.

c) Subject to the foregoing, CC shall defend, indemnify, and hold MP and MP's affiliates and MP's and MP's affiliates' distributors, retail partners and licensees harmless from and against all claims, expenses, liabilities, losses, and damage, including reasonable attorney's fees, resulting from, or arising in connection with, (i) any breach of this Agreement, including any failure of the Cooling Accessories and other products delivered to conform in any respect to the representations, warranties and covenants contained in any part of this Agreement, (ii) the failure of the Cooling Accessories and other products delivered to meet label claims or MP's quality control standards, (iii) the sale, purchase, or use of the Cooling Accessories and other products delivered by or through CC or (iii) intellectual property infringement and misappropriation

claims based on the products, and (iv) CC's negligence.

d) MP shall defend, indemnify, and hold CC and CC's affiliates and their respective employees, agents and licensees harmless from and against all third party claims, expenses, liabilities, losses, and damage, including reasonable attorney's fees, resulting from, or arising in connection with, (i) MP's negligence, (ii) the unauthorized promotion, sale, purchase, resale, or use of the products or any litigation or threatened litigation based thereon, and (iii) all intellectual property infringement and misappropriation claims based on the unauthorized use of the products or based on any content and materials provided by MP.

e) Upon the assertion of any claim or the commencement of any suit or proceeding against an indemnitee by any third party that may give rise to liability of an indemnitor, the indemnitee will promptly notify the indemnitor of the existence of such claim and will give the indemnitor a reasonable opportunity to defend and/or settle the claim at its own expense and with counsel of its own selection. The indemnitee will make available to the indemnitor all books and records relating to the claim, and the parties agree to render to each other such assistance as may reasonably be requested in order to ensure a proper and adequate defense. An indemnitee will not make any settlement of any claims that might give rise to liability of an indemnitor

without the prior written consent of the indemnitor.

f) Without limiting MP's rights to terminate any affected PO and obtain a refund of all amounts paid thereunder for suspended delivery, CC shall be excused from delay or non-performance in the delivery of any PO if and to the extent such delay or failure is caused by the following occurrences to the extent beyond the control of CC : acts of God; war, acts of terrorism, riots and civil disturbances; or expropriation or confiscation of facilities CC shall promptly notify MP of the existence of any such force majeure condition as soon as practicable and the anticipated extent of the delay or non-delivery. CC shall, in such event, have the right to allocate available products among its customers in its sole discretion

21) Insurance:

CC shall acquire and maintain at its sole cost and expense throughout the Term of this Agreement and any renewal of this Agreement, and for a period of one (1) year following the termination or expiration of this Agreement, commercial general liability insurance, including product liability and completed operations, advertising injury/personal injury and contractual liability coverage, underwritten by an insurance company on an occurrence form with an AM Best's rating of at least A-/VIII and authorized to do business in the United States. Such insurance coverage shall be primary and non-contributory for the benefit of

MP, contain a waiver of subrogation for additional insureds and provide coverage with limits of not less than $1,000,000 per occurrence and an annual general aggregate of not less than $2,000,000 and a products/completed operations aggregate of not less than $2,000,000 (which can be satisfied through a combination of primary and umbrella policy limits) and shall contain an endorsement by which the insurer extends the coverage thereunder to the extent necessary to include the contractual liability of CC arising by reason of the indemnity provisions set forth in this Agreement. All insurance policies shall name CC as a named insured and shall include MP as an additional insured. Insurance coverage represented by these policies shall provide coverage with respect to all products manufactured, sold and/or distributed by the CC. All insurance policies shall include a provision which provides that notice be given to MP at least thirty (30) days prior to cancellation of the policies. Insurance policies shall not contain cross-claim, cross-suit, or other such exclusion clauses which would preclude additional insured parties from instituting causes of action against other insureds under the policy or which would otherwise limit coverage of additional insureds. Certificates issued by CC's insurance company or companies evidencing the insurance required by this Section shall be provided to MP prior to the date on which CC first delivers products to MP and annually thereafter.

22) Confidentiality.

During the Term of this Agreement and after the expiration or termination of this Agreement, each party shall keep confidential, and shall require such party's officers, directors, employees, and agents to keep confidential, all non-public proprietary information of the other party, including (i) any information specifically identified by either party prior to disclosure as being confidential information, (ii) plans and data concerning products, prices, marketing, sales, customers, and (iii) technical or business matters. Disclosure of such confidential information shall be made by either party only to those of such party's employees, legal and financial advisors, representatives, investors and agents who have need to know such information in order to carry on the purposes of this Agreement and who have agreed in writing to abide by confidentiality requirements at least as restrictive as those set forth in this Agreement. A breach or threatened breach of this paragraph by the receiving party may cause irreparable harm and injury to the disclosing Party for which money damages are inadequate. In the event of such breach or threatened breach, the disclosing party shall be entitled to seek injunctive relief, in addition to all other available remedies, without the requirement of posting a bond or any other security.

23) Purchase Orders:

The parties agree and acknowledge that all products to be purchased hereunder by MP shall be purchased pursuant to the PO terms

set forth on Exhibit C hereto and those PO terms shall govern the purchase of such products. For clarity, and notwithstanding any other provision to the contrary, to the extent of any conflict or variation between the terms of this Agreement and the terms of any PO, the terms of the PO as set forth in Exhibit C shall apply in addition to and not in lieu of this Agreement, it being understood that the terms of this Agreement shall prevail in the event of any conflict or variation with any PO terms not set forth in Exhibit C; provided, however, that notwithstanding the foregoing, the parties may agree to alter the express written terms of any PO (i.e., the terms set forth in Exhibit C) if either party shall have notified the other in writing of a specific change requested in writing expressly calling out such alteration, and the other party shall have accepted such alteration in writing specifically responding to such requested alteration, in which case such altered terms shall prevail over the terms of this Agreement.

24) Amendment, Modification and Assignment:

This Agreement may be amended, modified, or supplemented only by a written agreement signed by each of the parties. This Agreement may be transferred or assigned in whole or in part by operation of law or otherwise by either party without the prior written consent of the other (a) in the event of any change of control or sale of such party to an affiliate or third party that assumes control of such party or (b) in the event of a sale by a party of substantially all the assets of such party (or substantially all

the assets relating to any Cooling Accessories hereunder), to the party acquiring such assets.

25) Governing Law; Jurisdiction:

The interpretation and construction of this Agreement, and all matters relating hereto, shall be governed by the laws of the state of New York without regard to its conflicts rules. Subject to and without limiting the requirements of Section 26 below (Dispute Resolution), any claims hereunder shall be brought in a state or federal court venued in New York, New York.

26) Dispute Resolution:

(a) Any and all disputes arising under or related to this Agreement (including, but not limited to, disputes related to the applicability or enforceability of this Section) that cannot be resolved through negotiations between the parties shall be submitted to non-binding mediation according to this Section. Completion of such mediation shall be a condition precedent to bringing any action pursuant to this Agreement. If the parties fail to reach a settlement of their dispute within fifteen (15) Business Days after the earliest date upon which one of the parties notified the other(s) in writing of a desire to attempt to resolve the dispute, then the dispute shall be promptly submitted to mediation by a single mediator chosen by the mutual consent of MP and CC. If MP and CC cannot agree on a single mediator, the mediation shall be held before a panel of three mediators, one to be

selected by MP, one to be selected by CC, and the third by agreement of the two mediators selected by the parties. The mediation shall take place in New York, New York. The English language shall be used throughout the mediation. The obligation of the parties to submit any dispute arising under or related to this Agreement to mediation as provided in this Article shall survive the expiration or earlier termination of this Agreement.

(b) If the parties fail to reach an agreement through the aforementioned mediation process, any dispute, controversy, or claim arising out of or relating to this Agreement shall be settled by arbitration before a single arbitrator in accordance with the Commercial Arbitration Rules of the American Arbitration Association then in effect. The place of arbitration shall be New York, New York. The award may be made a judgment of any Court of competent jurisdiction. The arbitrator is not authorized to award either party any consequential, indirect, exemplary or punitive damages.

(c) Notwithstanding any of the foregoing, either party may seek and obtain an injunction or other appropriate relief from a court to preserve the status quo with respect to any matter pending conclusion of the mediation, but no such application to a court of law or equity shall in any way be permitted to stay or otherwise impede the progress of the mediation.

27) Severability:

If any provision of this Agreement, or the application of such provision to any person or circumstance, shall be held invalid, the remainder of this Agreement, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

28) Counterparts/Execution Date:

This Agreement may be signed in one or more counterparts, each of which shall be deemed an original. Furthermore, facsimile copies shall be deemed the same as originals. This Agreement shall be deemed fully executed and effective when all parties have executed at least one of the counterparts ("Execution Date"), even though no single counterpart bears all such signatures. With respect to matters not already mutually agreed, to the extent that the Agreement requires the parties to mutually agree (or attempt to mutually agree) on particular matters on or before a certain number of days from the commencement of the Term, the parties agree and acknowledge that such references will be understood to mean an equivalent number of days from the Execution Date rather than the commencement of the Term.

29) Notices:

All notices or other communications hereunder shall be in writing and shall be deemed to be given or made when received by overnight courier, U.S. mail, registered or certified, first class, postage prepaid, or confirmed facsimile

or email (and in the case of facsimile or email, with a copy via one of the aforementioned forms of delivery promptly thereafter) to the following address or addresses or such other address or addresses as either Party may designate in writing to the other in accordance with this Section:

If to CC:

Tempnology, LLC
Attention: Justin Cupps and Richard Ferdinand
210 Commerce Way, Suite 100
Portsmouth, NH 03801
Fax: 603-570-4920
E-mail: JCupps@coolcore.com<mailto:
JCupps@coolcore.com
RFerdinand@coolcore.com<mailto:
RFerdinand@coolcore.com

If to MP:
Josh Shaw
Founder / President
MISSION PRODUCT HOLDINGS, INC.
390 5th Avenue, Suite 804
New York, NY 10018

F: 419.793.9145
Email: josh@missionatheletecare.com

30) Survival:

Those provisions herein which by their nature survive termination shall so survive, including without limitation, Sections 4, 15, 18, 20, 22, 25, 26, 29, and 30.

ACCEPTED AND AGREED as of
The date first written above:

Tempnology, LLC (d/b/a Coolcore)	**Mission Product Holdings, Inc.**
By: [Signature]	By:
Name: Justin Cupps	Name: Josh Shaw
Title: President	Title: President

Fax: 603-570-4920
E-mail: JCupps@coolcore.com<mailto:
JCupps@coolcore.com
RFerdinand@coolcore.com<mailto:
RFerdinand@coolcore.com

If to MP:
Josh Shaw
Founder / President
MISSION PRODUCT HOLDINGS, INC.
390 5th Avenue, Suite 804
New York, NY 10018

F: 419.793.9145
Email: josh@missionatheletecare.com

30) Survival:

Those provisions herein which by their nature survive termination shall so survive, including without limitation, Sections 4, 15, 18, 20, 22, 25, 26, 29, and 30.

ACCEPTED AND AGREED as of
The date first written above:

Tempnology, LLC (d/b/a Coolcore)	**Mission Product Holdings, Inc.**
By:	By: [Signature]
Name:	Name: Josh Shaw
Title:	Title: President

Exhibit A: Cooling Accessories

ACCESSORY	EXCLUSIVE	NON-EXCLUSIVE
WRAPS	X	
BANDANAS	X	
DOO RAG	X	
HEADBANDS		X
SLEEVES		X
YOGA MAT		X

Exhibit B: Vertically Integrated Partner List

Lululemon
Patagonia
North Face
Bauer Hockey
New Era*
Disney Retail Stores and Theme Parks**

*Carved out on a non-exclusive basis for hat liners only.
**Carved out for apparel only.

List of MP Factory Woven Projects in Process
Large towel ≈ 12"/33"
Wrap towel ≈ 6"/42"
X1 towel ≈15"/36"
Hoodie
Headband
bandana
Body Towel

Exhibit C - Purchase Order Form

MISSION PRODUCT HOLDINGS, INC. ("COMPANY") STANDARD PURCHASE ORDER TERMS

Each Company purchase order (an "Order") with the applicable vendor specified on the Order ("Vendor") is subject to all terms and conditions listed below and the other terms set forth in these Standard Purchase Terms (collectively, the "Agreement").

1. Time in connection with any discount offered will be computed from the last to occur of: (a) the scheduled date of receipt of merchandise; (b) the actual date of receipt of merchandise and (c) the date an acceptable invoice is received. Any offsetting claim of the Company against Vendor may be deducted by the Company from the amount of an invoice at the time of payment.

2. All Orders are void unless confirmed in writing on Company's printed form and approved by an executive of Company.

3. Orders must be accepted according to the terms stated herein and any additional or different terms in Vendor's invoice, purchase order or otherwise specified by Vendor will be void and of no legal effect unless accepted in a written instrument signed by an officer of Company. If no notification is given to Company within five days after receipt of an Order or if shipment is made of any part thereof, it is understood that the terms and conditions of this Agreement are satisfactory to and are accepted by Vendor. Without limiting the foregoing, it is understood that performance of an Order must be in accordance with its terms, dating and conditions, and

there can be no changes or alterations thereto unless in writing and signed by a duly authorized person of Company. In addition to all other legal rights, Company reserves the right to cancel an Order and/or to return at Vendor's expense, all or any part of the merchandise in the event the merchandise (a) is defective, (b) is not fit for the purpose sold, or (c) varies from the sample from which or specifications for which the Order was placed or (d) fails to comply with Company's shipping or billing instruction or with any of the provisions of this Agreement.

4. Time of delivery at Company's warehouse or other Company designated location is of the essence of this Agreement, and Company reserves the right to cancel all or any part of an Order if merchandise is not delivered on the date or dates specified herein, but receipt of merchandise in such cases shall in no way bind Company or limit the Company's right to reject or direct disposal of all or any part thereof.

5. Vendor expressly warrants that the merchandise to be delivered under an Order will conform to the sample from which or specifications for which the Order was placed and will be of best material and workmanship, free from defects and merchantable.

6. All goods shall be received subject to Vendor's rights of acceptance and rejection. Company shall be under no duty to inspect goods before resale and resale, repackaging or culling up for purchase or resale shall not be considered an acceptance of the goods so as to bar Company's right to reject them. Complaints, notice of defects in merchandise or notice of any other breach will be considered made within a reasonable time if made a reasonable time

after notification is given to Company of such defects or other breach by Company's customers, regardless of whether Company has already made payment for such merchandise. The return of such defective merchandise shall not relieve Vendor from liability for failing to ship satisfactory merchandise under an Order. Failure of Company to state a particular defect upon rejection shall not preclude Company from relying on unstated defects to justify rejection or establish breach.

7. If Vendor shall breach any provision of this Agreement, Company shall have the right to cancel this Agreement and/or any Orders, in whole or in part, without liability to Vendor and without limiting Company's other rights or remedies.

8. Company reserves the right to return at Vendor's expense any merchandise and cancel any Order where a claim is made that the sale or use by Company infringes or violates any alleged patent, design, trade name, trademark, copyright or any other right of a third party and in the event of such infringement or violation or alleged infringement or violation, Vendor shall be deemed in breach of this Agreement. Vendor agrees to indemnify Company and hold it harmless against any and all liability, damages, loss or expense, including costs and counsel fees (collectively "Loss"), which may be incurred by Company as the result of any claim, demand, suit or proceeding of any kind ("Claim") alleging any violation or infringement of any third party rights, including without limitation, any design, patent, trade name, trademark, copyright or unfair competition Claim now existing or hereafter commenced with respect to any or all items covered by any Order.

9. Vendor agrees to indemnify Company and hold Company harmless from all Loss arising from or relating to the sale or use of any merchandise provided by or through Vendor hereunder or from any defects in the quality of such merchandise or the dangerous conditions thereof or from Vendor's failure to provide such merchandise as and when specified under any Order, and agrees to pay any judgment against and assume any liability and expense of Company in connection therewith, including, without limitation, in connection with Claims of any kind which any purchaser of such merchandise from Company or any other person may make against Company or any Loss otherwise incurred by Company whether or not in connection with a Claim. Vendor shall procure and maintain adequate products liability and professional liability insurance and shall furnish to Company certificates thereof in connection with any Order. Upon request, Vendor shall name Company as an additional insured under such insurance policies.

10. Vendor, by accepting an Order, represents and warrants and guarantees (a) that all applicable provisions of federal, state and local laws, ordinances, codes and regulations have been complied with and that the prices and other terms and conditions of sale and the terms on which all promotional and advertising matter are furnished by Vendor to Company comply with all such laws, ordinances, codes, (b) that the weights, measures, sizes, legends, words, particulars or description, if any stamped, printed or otherwise attached to the merchandise or containers conform and comply with the applicable provisions of the Fur Products Labeling Act, Wool Products Labeling Act, the Flammable Fabrics Act,

the Textile Fibers Products Identification Act, the wage, hour and child labor provisions of the Fair Labor Standards Act, the Robinson-Patman Act, and the Federal Food, Drug and Cosmetics Act (collectively, the "Acts"), (c) that the merchandise sold and the terms and conditions of sale conform with applicable Federal Trade Commission trade practice rules, if any, (d) that the merchandise sold otherwise complies with any other applicable labeling and invoicing laws, if any, and all advertising matter furnished by Vendor to Company complies with applicable law. Vendor agrees to indemnity and hold harmless Company against all Loss arising from Claims alleging violation of law based upon any act or omission of Vendor or Vendor's breach of this Agreement. The Company reserves the right to return any portion of a shipment or the entire shipment to the Vendor at the Vendor's expense whenever any of the terms or conditions of this Agreement are violated or not fully complied with.

11. All materials created under the Order, including without limitation all artwork, layouts, photographs, scripts, ideas, concepts, characters, specifications, graphics, programs, software, designs and other property or materials furnished hereunder (the "Materials"), are specially commissioned for Company. Subject solely to the limitations specifically set forth on the Order (if any), all Materials shall be deemed to be works for hire for Company under the U.S. Copyright Act, and will be and remain the absolute and exclusive property of Company, its successors and assigns, in perpetuity. Vendor further agrees to execute and cause others who in any way contribute to the creation of the Materials to execute all further documents that, in the judgment of

Company, are required or useful to establish, protect or enforce the rights herein granted or confirmed. To the extent necessary to vest full ownership of the Materials with Company, Vendor hereby irrevocably sells, transfers, and assigns all rights, title and interest, including the copyright in and to the Materials to Company, and its successors and assigns, without limitation.

12. Vendor shall pay and assume any and all taxes, fees, imposts, or stamps required by law by virtue of the sale of merchandise to Company.

13. Inclusion herein of express warranties and representations by Vendor shall not be deemed a waiver of such other warranties as may be implied in law or fact or provided for by any State or Federal statue or regulation. Any warranties, express or implied, shall survive inspection, acceptance and payment by Company and Company's customers. No amendment, modification or waiver of any of the terms and condition of this Agreement shall be effective unless in writing and signed by an officer of Company. No waiver of any breach or of any terms or conditions of this Agreement shall be construed a waiver of any subsequent breach of that term or condition or other term or condition of same or different natures of this or any other Order or contract. The remedies herein provided for Company shall be deemed cumulative and the exercise of any one shall not preclude the exercise of or be deemed a waiver of any other remedy, nor shall the specification of any remedy hereunder exclude or be deemed a waiver of any rights or remedies at law, or in equity, which may be available to Company.

14. Unless authorized otherwise in writing in advance by Company, Vendor shall not disclose to any third party any information and/or material related to the functions Vendor performed or information Vendor received or had access to in connection with any Orders or this Agreement. Vendor shall not use said information other than as required to perform hereunder without Company's prior written approval.

15. Discontinuance of or substantial interference with Company's business in whole or in part, by reason of fire, flood, earthquake, tempest, labor dispute, war, act of God, embargo, civil commotion, or governmental regulation or cause beyond Company's control will give it the option of canceling all or any part of undelivered Orders or unfilled parts thereof without liability.

16. This Agreement, and any right or obligation hereunder, is not assignable without the written consent of Company. Company shall be under no obligation to recognize any assignment of (a) moneys payable hereunder(b) any rights in the merchandise ordered herein, or (c) any other rights arising hereunder. No subcontracting shall be made by Vendor to any other party without Company's prior written approval.

17. This Agreement shall be construed according to the laws of the State of New York and all actions and disputes arising from or relating to this Agreement shall be brought exclusively in the State or Federal Courts located in New York, New York and Vendor hereby consents to the exclusive jurisdiction of such Courts.

18. All shipments of Orders must be in strict compliance with Company's published shipping instruc-

tions. Any shipments not in compliance will be subject to handling fees and cost- reimbursements via charge backs to the Vendor's account.

19. Notwithstanding any prior inspections and irrespective of any stated FOB point, Vendor shall bear all risks of loss, damage or destruction of merchandise called for hereunder until final acceptance by Company. Vendor shall bear the same risks with respect to any merchandise rejected by Company; provided however, that in either case Company shall be responsible for any loss occasioned by the gross negligence of its employees acting within the scope of their employment.

Exhibit D: Finished Goods Pricing:

Description		DOP NJ (Ocean)		FOB China	
Product Name (Material Classification)	**Packaging Type**	**W/Packaging**	**W/O Packaging**	**W/Packaging**	**W/O Packaging**
Large Towel (woven)- 12.25"X35"	LG Tube	$3.07	$2.66	$2.69	$2.28
Wrap – (Woven)- 8'X44"	LG Tube	$3.70	$3.29	$3.33	$2.92
Bandana (woven)		TBD	TBD	TBD	TBD
Body Towel (knit) – 18 piece MSTR	LG Box	$8.65	$8.37	$8.06	$7.78
Body Towel (knit) – 6 piece MSTR	LG Box	$8.75	$8.47	$8.16	$7.88
Large Towel	LG Tube	$3.87	$3.46	$3.49	$3.08

(knit)					
XL Towel (knit)	XL Tube	$4.30	$3.84	$3.92	$3.46
Medium Towel (knit)	LG Tube	$3.35	$2.94	$2.97	$2.56
Hoodie (knit)	XL Tube	$4.70	$4.24	$4.27	$3.81
Football Skull Cap	SM Box	$3.10	$2.94	$2.90	$2.74
All-Sport Skull Cap	SM Box	$3.10	$2.94	$2.90	$2.74
Wristbands	SM Box	TBD	TBD	TBD	TBD
Sleeve (knit)	SM Box	$4.88	$4.72	$4.53	$4.37
Sleeve (knit) – 2PK	SM Box	$9.60	$9.44	$8.90	$8.74
2" headband (knit)	SM Box	$3.25	$3.09	$2.94	$2.78
4" headband (Knit)	SM Box	$3.58	$3.42	$3.26	$3.10
Multi Chill (knit) – 24 piece MSTR	MD Box	$3.75	$3.47	$3.39	$3.11

Multi Chill (knit) – 6 piece MSTR	MD Box	$3.86	$3.47	$3.50	$3.11
Wrap (Knit)- 8"x44"	LG Tube	$3.80	$3.39	$3.42	$3.01
Wrap (Knit)- 6"X42"	SM Box	$3.00	$2.84	$2.68	$2.52
Do-Rag (knit)		TBD	TBD	TBD	TBD
Team socks		TBD			
Basket-ball socks		TBD			
Running socks		TBD			
Baselay-er shirt		TBD			
Yoga Mat		TBD			
MSTR = Master Shipping Carton					2 26 13

EXHIBIT E - ILLUSTRATION OF CC BRANDING

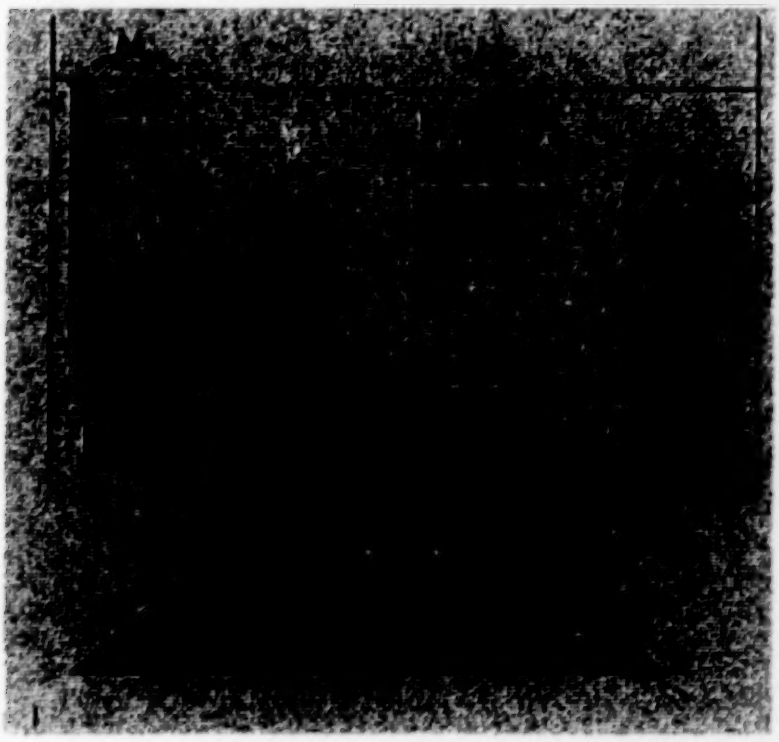


EXHIBIT E: WARRANT TO PURCHASE SHARES OF MISSION COMMON STOCK

THESE SECURITIES HAVE NOT BEEN REGISTERED UNDER THE SECURITIES ACT OF 1933, AS AMENDED, OR ANY APPLICABLE STATE SECURITIES LAWS AND HAVE BEEN ACQUIRED FOR INVESTMENT AND NOT WITH A VIEW TO, OR IN CONNECTION WITH, THE SALE OR DISTRIBUTION THEREOF. NO SUCH SALE OR DISTRIBUTION MAY BE EFFECTED WITHOUT AN EFFECTIVE REGISTRATION STATEMENT OR QUALIFICATION RELATED THERETO OR AN OPINION OF COUNSEL IN A FORM REASONABLEY SATISFACTORY TO THE COMPANY THAT SUCH REGISTRATION OR QUALIFICATION IS NOT REQUIRED UNDER THE SECURITIES ACT OF 1933, AS AMENDED, OR ANY APPLICABLE STATE SECURITIES LAWS.

Date of Issuance: February ____, 2013

MISSION PRODUCT HOLDINGS, INC.

WARRANT TO PURCHASE SHARES OF COMMON STOCK

THIS CERTIFIES THAT, for value received, Tempnology, LLC d/b/a Coolcore (the "***Holder***") is entitled to purchase from Mission Product Holdings, Inc., a Delaware corporation (the "***Company***"), subject to the terms and conditions of this Warrant, at any time (but only once) prior to the Expiration Date (as defined below), Twenty Thousand (20,000) (the "***Base Amount***") shares of the Company's Common Stock, par value $0.01 ("***Common Stock***") for each $2,000,000 of pur-

chases made by the Company under the Co- Marketing and Distribution Agreement, effective as of November 21, 2012, between the Holder and the Company (the "***Agreement***") during the 12-month period ending on the last day of the calendar month immediately preceding the date of exercise of this Warrant, at an exercise price per share of $8.75 (the "***Exercise Price***"). Notwithstanding anything to the contrary to the foregoing, the maximum number of shares of Common Stock for which this Warrant may be exercised shall not exceed Four Hundred Thousand (400,000) shares (the "***Maximum Amount***") (i.e. 20 times the Base Amount). For example, if, on July 18, 2015, the Company has purchased from the Holder $6.7 million of products under the Agreement during the period beginning on July 1, 2014 and ending on June 30, 2015, the Holder shall be entitled to purchase 60,000 Warrant Shares (the Base Amount multiplied by 3) under this Warrant as of that date. The shares of Common Stock purchasable upon exercise of this Warrant are hereinafter referred to as the "***Warrant Shares***". The Warrant Shares and the Exercise Price are subject to further adjustment as set forth in Section 2. For the purposes of this Warrant, the Company will be deemed to have purchased a product within a time period if the Holder has shipped the product to the Company during the applicable time period against an outstanding accepted order submitted by the Company (whether or not such order was submitted by the Company and accepted by the Holder within such time period).

1. Exercise of Warrant.

1.1 Term. This Warrant shall terminate and no longer be exercisable upon the earliest to occur of the following: (a) the date that is 30 days after the expiration of the Agreement, (b) the date that is 30 days after

the termination of the Agreement pursuant to Section 3 of the Agreement, (c) the sale of substantially all of the assets or outstanding capital stock of the Company, including through a merger, (d) the date on which the Holder exercises, in whole or in part, this Warrant to purchase Warrant Shares, and (e) February 1, 2023 (such date of termination of this Warrant, the "***Expiration Date***").

1.2 Method. This Warrant may be exercised by the Holder, in whole or in part in increments of not less than the Base Amount, by:

(a) the surrender of this Warrant (with the Notice of Exercise form attached hereto as Attachment A and the Investment Representation Statement attached hereto as Attachment B duly executed) at the principal office of the Company; and

(b) the payment to the Company, by check or wire, of an amount equal to the Exercise Price per share multiplied by the number of Warrant Shares then being purchased.

1.3 Net Exercise. If (a) the Common Stock is listed on a national securities exchange at the time of exercise of this Warrant or (b) this Warrant is being exercised upon the consummation of a merger of the Company in which the Common Stock is being converted into the right to receive solely cash, in lieu of Section 1.2 hereof, the Holder may elect to convert this Warrant or any portion thereof (the "***Conversion Right***"), by surrender of this Warrant at the principal office of the Company together with notice of the Holder's intention to exercise the Conversion Right, into that number of Warrant Shares computed using the following formula:

$$X = \frac{Y(A-B)}{A}$$

Where:

X = The number of Warrant Shares to be issued to the Holder upon exercise of Conversion Right.

Y = The number of Warrant Shares for which this Warrant is being exercised.

A = The Fair Market Value (as defined below) of one Warrant Share at the time the Conversion Right is exercised as determined in good faith by the Board of Directors of the Company.

B = Exercise Price (as adjusted to the date of such calculation).

1.4 Delivery; Certificate. Upon receipt by the Company of this Warrant (with the Notice of Exercise form attached hereto as Attachment A and the Investment Representation Statement attached hereto as Attachment B duly executed) at its principal office, or by the stock transfer agent or warrant agent of the Company at its office, and, if applicable, the aggregate Exercise Price, the Holder shall be deemed to be the holder of record of the applicable Warrant Shares, notwithstanding that the stock transfer books of the Company shall then be closed or that certificates representing such Warrant Shares shall not then be actually delivered to the Holder. Upon the exercise of this Warrant in whole or in part, the Holder shall execute and deliver to the Company agreements, certificates and other documents (including without limitation, any stockholders agreement or other agreement relating to the Warrant Shares) that the Company reasonably requires. The Company shall, as soon as practicable after the exercise of this Warrant in accordance with the

terms hereof, prepare a certificate for the Warrant Shares purchased in the name of the Holder. If this Warrant should be exercised in part only, the Company shall, as soon as practicable after the surrender of this Warrant, execute and deliver a new Warrant evidencing the rights of the Holder thereof to purchase the balance of the Warrant Shares purchasable hereunder.

2. Adjustment of Exercise Price and Number of Warrant Shares. The number (including the Base Amount and the Maximum Amount) and kind of Warrant Shares purchasable upon the exercise of this Warrant and the Exercise Price shall be subject to adjustment from time to time upon the occurrence of the following events:

2.1 Subdivision or Combination. If the Company at any time prior to the Expiration Date shall subdivide or combine its Common Stock, the Exercise Price shall be proportionately decreased (and the number of Warrant Shares issuable upon exercise of this Warrant proportionately increased to the nearest whole) in the case of a subdivision or the Exercise Price shall be proportionately increased (and the number of Warrant Shares issuable upon exercise of this Warrant proportionately decreased to the nearest whole) in the case of a combination.

2.2 Reclassification, Reorganization and Consolidation. In case of any reclassification, capital reorganization or change in the type of securities of the Company issuable upon exercise of this Warrant (other than as a result of a subdivision, combination or stock dividend provided for in Section 2.1 above or Section 2.3 below), then, as a condition of such reclassification, reorganization or change, lawful provision shall be made, and duly executed documents evidencing the same from the

Company or its successor shall be delivered to the Holder, so that the Holder shall have the right at any time prior to the expiration of this Warrant to purchase, at a total price equal to that payable upon the exercise of this Warrant, the kind and amount of shares of stock and other securities or property receivable in connection with such reclassification, reorganization or change by a holder of the same number and type of securities as were purchasable as Warrant Shares by the Holder immediately prior to such reclassification, reorganization or change. In any such case appropriate provisions shall be made with respect to the rights and interest of the Holder so that the provisions hereof shall thereafter be applicable with respect to any shares of stock or other securities or property deliverable upon exercise hereof, and appropriate adjustments shall be made to the Exercise Price per Warrant Share payable hereunder, provided the aggregate Exercise Price shall remain the same.

2.3 Stock Dividends. If the Company at any time prior to the Expiration Date shall pay a dividend with respect to Common Stock payable in Common Stock (except any distribution accounted for in the foregoing Section 2.1), then the Exercise Price shall be adjusted, from and after the record date for shareholders entitled to receive such dividend or distribution, to that price determined by multiplying the Exercise Price in effect immediately prior to such record date by a fraction (a) the numerator of which shall be the total number of shares of Common Stock outstanding immediately prior to such dividend or distribution, and (b) the denominator of which shall be the total number of shares of Common Stock outstanding immediately after such dividend or distribution.

3. Fractional Warrant Shares. No fractional Warrant Shares will be issued in connection with any exercise hereunder, but in lieu of such fractional shares the Company shall make a cash payment therefor upon the basis of the Exercise Price then in effect.

4. Stock Fully Paid; Reservation of Warrant Shares. All Warrant Shares issuable upon the exercise of the rights represented by this Warrant will, upon issuance, be fully paid and nonassessable. During the period within which the rights represented by this Warrant may be exercised, the Company will at all times have authorized and reserved for the purpose of issuance upon exercise of the purchase rights evidenced by this Warrant, a sufficient number of shares of Common Stock to provide for the exercise of the rights represented by this Warrant. In the event that there is an insufficient number of shares of Common Stock reserved for issuance pursuant to the exercise of this Warrant, the Company will take appropriate action to authorize an increase in the capital stock to allow for such issuance or similar issuance acceptable to the Holder.

5. Securities Laws; Transfer; Certain Representations.

5.1 The Holder hereby represents and warrants to the Company the following:

(a) Investment Experience. The Holder is an "accredited investor" within the meaning of Rule 501(a) of the Securities Act of 1933, as amended (the "***Act***"), is capable of evaluating the merits and risks of its investment in the Company and has the capacity to protect its own interests. The Holder is aware of the Company's business affairs and financial condition and has acquired sufficient information about the Company

to reach an informed and knowledgeable decision to acquire the Warrant and the Warrant Shares.

(b) Purchase Entirely for Own Account. The Warrant and the Warrant Shares are being acquired for investment for the Holder's own account, not as a nominee or agent, and not with a view to the resale or distribution of any part thereof. The Holder has no present intention of selling, granting any participation in, or otherwise distributing the Warrant or the Warrant Shares. The Holder further represents that it does not have any contract, undertaking, agreement or arrangement with any person to sell, transfer or grant participations, to such person or to any third person, with respect to the Warrant or the Warrant Shares.

(c) Restricted Securities. The Holder understands that the Warrant and the Warrant Shares are characterized as "restricted securities" under the federal securities laws inasmuch as they are being acquired from the Company in a transaction not involving a public offering and that under such laws and applicable regulations the Warrant and such Warrant Shares may be resold without registration under the Act only in certain limited circumstances. In this connection, the Holder represents that it is familiar with Rule 144, as presently in effect, and understands the resale limitations imposed thereby and by the Act. The Holder must bear the economic risk of this investment indefinitely unless the Warrant or the Warrant Shares are registered pursuant to the Act, or an exemption from registration is available. The Holder understands that the Company has no present intention of registering the Warrant or the Warrant Shares. The Holder also understands that there is no assurance that any exemption from registration under the Act will be available and that, even if available, such exemption may not al-

low the Holder to transfer all or any portion of the Warrant or the Warrant Shares under the circumstances, in the amounts or at the times the Holder might propose.

5.2 Compliance with Securities Act. The Holder, by acceptance hereof, agrees that it will not offer, sell or otherwise dispose of this Warrant or any Warrant Shares except under circumstances which will not result in a violation of the Act. Upon exercise of this Warrant, the Holder hereof shall confirm in writing, in the form attached hereto as Attachment B, that the Warrant Shares so purchased are being acquired for investment and not with a view toward distribution or resale. In addition, the Holder shall provide such additional information regarding such Holder's financial and investment background as the Company may reasonably request. This Warrant and all Warrant Shares (unless registered under the Act) shall be stamped or imprinted with a legend in substantially the following form:

> THESE SECURITIES HAVE NOT BEEN REGISTERED UNDER THE SECURITIES ACT OF 1933, AS AMENDED, OR ANY APPLICABLE STATE SECURITIES LAWS AND HAVE BEEN ACQUIRED FOR INVESTMENT AND NOT WITH A VIEW TO, OR IN CONNECTION WITH, THE SALE OR DISTRIBUTION THEREOF. NO SUCH SALE OR DISTRIBUTION MAY BE EFFECTED WITHOUT AN EFFECTIVE REGISTRATION STATEMENT OR QUALIFICATION RELATED THERETO OR AN OPINION OF COUNSEL IN A FORM SATISFACTORY TO THE COMPANY THAT SUCH REGISTRATION

OR QUALIFICATION IS NOT REQUIRED UNDER THE SECURITIES ACT OF 1933, AS AMENDED, OR ANY APPLICABLE STATE SECURITIES LAWS.

5.3 Transferability of Warrant. This Warrant may not be transferred or assigned in whole or in part without (a) the prior written consent of the Company and (b) compliance with applicable federal and state securities laws; *provided, however*, that the Holder of this Warrant may transfer this Warrant without the prior written consent of the Company to an entity that purchases all or substantially all of the assets of, or merges with, the Holder, subject to the terms and conditions of the Agreement.

5.4 Disposition of Warrant Shares. The Holder agrees not to make any disposition of all or any portion of the Warrant or the Warrant Shares unless and until (a) the Holder shall have notified the Company of the proposed disposition and shall have furnished the Company with a statement describing the circumstances surrounding the proposed disposition in reasonable detail, (b) the transferee has agreed in writing for the benefit of the Company to be bound by this Section 5 and (c):

(i) there is then in effect a registration statement under the Act covering such proposed disposition and such disposition is made in accordance with such registration statement; or

(ii) the Holder shall have furnished the Company with an opinion of counsel, reasonably satisfactory to the Company, that such disposition will not require registration of the Warrant or the Warrant Shares under the Act; provided that the Company will not re-

quire opinions of counsel for transactions made pursuant to Rule 144 except in unusual circumstances.

5.5 Company Right of First Refusal. The Holder acknowledges the provisions set forth in the Company's bylaws (as made available by the Company to the Holder on the date of issuance hereof) with respect to restrictions on the transfer of the Common Stock. For so long as such restrictions are in effect, in the event of any conflict between the provisions of the Company's bylaws and this Section 5.5, the Holder's compliance with the applicable provisions of the Company's bylaws shall be deemed to satisfy the Holder's obligations under this Section 5.5.

(a) Notice of Proposed Transfer. If the Holder proposes to sell, assign, transfer, pledge, hypothecate or otherwise dispose of, by operation of law or otherwise (collectively, "***transfer***") any Warrant Shares acquired upon exercise of this Warrant, then the Holder shall first give written notice of the proposed transfer (the "***Transfer Notice***") to the Company. The Transfer Notice shall name the proposed transferee and state the number of such Warrant Shares the Holder proposes to transfer (the "***Offered Shares***"), the price per share and all other material terms and conditions of the transfer.

(b) Company Right to Purchase. For 30 days following its receipt of such Transfer Notice, the Company shall have the option to purchase all of the Offered Shares at the price and upon the terms set forth in the Transfer Notice. In the event the Company elects to purchase all of the Offered Shares, it shall give written notice of such election to the Holder within such 30-day period. Within 10 days after its receipt of such notice, the Holder shall tender to the Company at the address

listed for notices in Section 7.6 the certificate or certificates representing the Offered Shares to be purchased by the Company, duly endorsed in blank by the Holder or with duly endorsed stock powers attached thereto, all in a form suitable for transfer of the Offered Shares to the Company. Promptly following receipt of such certificate or certificates, the Company shall deliver, by wire transfer to an account designated by the Holder in writing to the Company, full payment of the purchase price for such Offered Shares; provided that if the terms of payment set forth in the Transfer Notice were other than cash against delivery, the Company may pay for the Offered Shares on the same terms and conditions as were set forth in the Transfer Notice; and provided further that any delay in making such payment shall not invalidate the Company's exercise of its option to purchase the Offered Shares.

(c) Shares Not Purchased By Company. If the Company does not elect to acquire all of the Offered Shares, the Holder may, within the 90-day period following the expiration of the option granted to the Company under subsection (b) above, transfer the Offered Shares which the Company has not elected to acquire to the proposed transferee, provided that such transfer shall not be on terms and conditions more favorable to the transferee than those contained in the Transfer Notice. Notwithstanding any of the above, all Offered Shares transferred pursuant to this Section 5.5 shall remain subject to the right of first refusal set forth in this Section 5.5 and such transferee shall, as a condition to such transfer, deliver to the Company a written instrument confirming that such transferee shall be bound by all of the terms and conditions of this Section 5.5.

(d) Consequences of Non-Delivery. After the time at which the Offered Shares are required to be delivered to the Company for transfer to the Company pursuant to subsection (b) above, the Company shall not pay any dividend to the Holder on account of such Offered Shares or permit the Holder to exercise any of the privileges or rights of a stockholder with respect to such Offered Shares, but shall, insofar as permitted by law, treat the Company as the owner of such Offered Shares.

(e) Exempt Transactions. The following transactions shall be exempt from the provisions of this Section 5.5:

(i) any transfer pursuant to an effective registration statement filed by the Company under the Securities Act of 1933, as amended (the "Securities Act");

(ii) the sale of all or substantially all of the outstanding shares of capital stock of the Company (including pursuant to a merger or consolidation); and

(iii) any transfer from the Holder to an entity that purchases all or substantially all of the assets of, or merges with, the Holder.

(f) Assignment of Company Right. The Company may assign its rights to purchase Offered Shares in any particular transaction under this Section 5.5 to one or more persons or entities.

(g) Termination. The provisions of this Section 5.5 shall terminate upon the earlier of the following events:

(i) the closing of the sale of shares of Common Stock in an underwritten public offering pursuant to an effective registration statement filed by the Company under the Act;

(ii) or the sale of all or substantially all of the outstanding shares of capital stock, assets or business of the Company, by merger, consolidation, sale of assets or otherwise (other than a merger or consolidation in which all or substantially all of the individuals and entities who were beneficial owners of the Company's voting securities immediately prior to such transaction beneficially own, directly or indirectly, a majority (determined on an as-converted basis) of the outstanding securities entitled to vote generally in the election of directors of the resulting, surviving or acquiring corporation in such transaction).

(h) No Obligation to Recognize Invalid Transfer. The Company shall not be required (i) to transfer on its books any of the Warrant Shares which shall have been sold or transferred in violation of any of the provisions set forth in this Section 5.5, or (ii) to treat as owner of such Warrant Shares or to pay dividends to any transferee to whom any such Warrant Shares shall have been so sold or transferred.

(i) Legends. The certificate representing Warrant Shares shall bear a legend substantially in the following form (in addition to, or in combination with, any legend required by applicable federal and state securities laws and agreements relating to the transfer of the Company securities):

> "The shares represented by this certificate are subject to a right of first refusal in favor of the Company, as provided in a certain warrant, dated as of February 27, 2012, with the Company."

5.6 Market Standoff. Each Holder agrees, in connection with the Company's initial public offering (the "*IPO*") of its equity securities, and upon request of the

Company or the underwriters managing such offering, (a) not to sell, make any short sale of, loan, grant any option for the purchase of or otherwise dispose of any of the Warrants or the Warrant Shares (other than those included in the registration, if any) without the prior written consent of the Company or such underwriters, as the case may be, for such period of time (not to exceed one hundred eighty (180) days (or such longer period of time as may be required to accommodate regulatory restrictions on (i) the publication or other distribution of research reports and (ii) analyst recommendations and opinions, including, but not limited to, the restrictions contained in NASD Rule 2711(f)(4) or NYSE Rule 472(f)(4), as applicable, (or any successor rules or amendments thereto))) from the effective date of such registration as may be requested by the Company or such underwriters and (b) to execute any agreement regarding (a) above as may be requested by the Company or underwriters at the time of the public offering; provided, that the officers and directors of the Company who own stock of the Company also agree to such restrictions. The Company may impose stop transfer instructions to enforce this Section 5.6.

5.7 Representations and Warranties of the Company. The Company represents and warrants to, and agrees with, the Holder as follows:

(a) The initial Exercise Price referenced on the first page of this Warrant is not greater than the per share exercise price under any warrant or stock option issued by the Company (other than warrants issued by the Company with a per share exercise price less than $0.50 per share) within the 6-month period preceding the date of issuance of this Warrant.

(b) All Shares which may be issued upon the exercise of this Warrant, and all securities, if any, issuable upon conversion of the Shares, shall, upon issuance, be duly authorized, validly issued, frilly paid and non-assessable, and free of any liens and encumbrances except for restrictions on transfer provided for herein or under applicable federal and state securities laws. The Company covenants that it shall at all times cause to be reserved and kept available out of its authorized and unissued capital stock such number of shares of Common Stock as will be sufficient to permit the exercise in full of this Warrant.

(c) As of the effective date of the Agreement, the Base Amount represented not less than approximately 0.5% of the capital stock of the Company on fully diluted basis (without accounting for any outstanding stock options and warrants as of such effective date, but accounting for all outstanding stock options and warrants as of such effective date with an exercise price of less than $0.50 per share).

6. Rights of Stockholders. No Holder of this Warrant shall be entitled to vote or receive dividends or be deemed the holder of capital stock or any other equity securities of the Company, nor shall anything contained herein be construed to confer upon the Holder of this Warrant, as such, any of the rights of a stockholder of the Company or any right to vote for the election of directors or upon any matter submitted to stockholders at any meeting thereof, or to give or withhold consent to any corporate action (whether upon any recapitalization, issuance of stock, reclassification of stock, change of par value or change of stock to no par value, consolidation, merger, conveyance, or otherwise) or to receive notice of meetings, or to receive dividends or subscription rights or otherwise until this Warrant has been ex-

ercised and the Warrant Shares shall have become deliverable, as provided herein.

7. Miscellaneous.

7.1 Governing Law. This terms and conditions of this Warrant shall be governed in all respects by the internal laws of the State of Delaware without regard to conflicts of laws principles that would result in the application of the laws of any other jurisdiction.

7.2 Successors and Assigns. This Warrant shall be binding upon any successors or assigns of the Company and inure to the benefit of the Holder and any successors or assigns.

7.3 Waivers and Amendments. This Warrant and any provisions hereof may be changed, waived, discharged or terminated only by an instrument in writing signed by the Company and the Holder.

7.4 Loss of Warrant. Upon receipt of evidence reasonably satisfactory to the Company of the loss, theft, destruction or mutilation of this Warrant and, in the case of any such loss, theft or destruction, upon delivery of an indemnity agreement reasonably satisfactory in form and amount to the Company, or, in the case of any such mutilation, upon surrender and cancellation of such Warrant, the Company will execute and deliver a new Warrant of like terms.

7.5 Headings. The headings in this Warrant are for purposes of convenience and reference only, and shall not be deemed to constitute a part hereof.

7.6 Notices. All notices and other communications given or made pursuant hereto shall be in writing and shall be deemed effectively given: (a) upon personal delivery to the party to be notified, (b) when sent by confirmed facsimile if sent during normal business hours of

the recipient, and if not so confirmed, then on the next business day, (c) seventy-two (72) hours after having been sent by registered or certified mail, return receipt requested, postage prepaid, or after being deposited in the U.S. mail, postage prepaid, or (d) one (1) day after deposit with a nationally recognized overnight courier, specifying next day delivery, with written verification of receipt, in the case of the Holder, addressed to the Holder at the address set forth on the signature page hereto and, in the case of the Company, to Mission Product Holdings, Inc., 390 5th Avenue, Suite 804, New York, NY 10018, Attention: President, with a copy to David & Gilbert LLP, 1740 Broadway, New York, NY 10019, Attention: Richard Eisert; or as subsequently modified by written notice to the other party.

7.7 Notices of Certain Events. In the event of any consolidation or merger involving the Company, or sale or conveyance of all or substantially all of its assets, then and in each such event the Company will mail or cause to be mailed to the Holder a notice containing a brief description of the proposed action and stating the date on which any such consolidation, merger, sale or conveyance is to take place, and the time, if any is to be fixed, as of which the holders of record in respect of such event are to be determined. Such notice shall be mailed at least four (4) business days prior to the date specified in such notice on which any such action is to be taken and the Holder shall have the opportunity to exercise this Warrant during such four (4) business day period.

The Company shall also promptly notify the Holder of any adjustment in the Exercise Price or the number of Warrant Shares pursuant to Section 2 hereof and at least ten (10) business days in advance of effecting an IPO.

7.8 Counterparts. This Warrant may be executed in two or more counterparts (including, but not limited to. by facsimile, PDF or other electronic copy), each of which shall be deemed an original and all of which together shall constitute one instrument.

(Signature page follows)

IN WITNESS WHEREOF, the Company has caused this Warrant to be executed by a duly authorized officer.

MISSION PRODUCT HOLDINGS, INC

By: _____
Name: Josh Shaw
Title: President

ACKNOWLEDGED:

TEMPNOLOGY, LLC D/B/A COOL CORE

By: _____
Name:
Title:

Address: Tempnology, LLC
Attention: Justin Cupps and Richard Ferdinand
210 Commerce Way, Suite 100
Portsmouth, NH 03801
Fax: 603-570-4920

E-mail: JCupps@coolcore.com
RFerdinand@coolcore.com

[WARRANT SIGNATURE PAGE]

ATTACHMENT A

NOTICE OF EXERCISE

TO: **Mission Product Holdings, Inc.**

☐ The undersigned hereby elects to purchase _____ shares of Common Stock of Mission Product Holdings,, Inc. pursuant to the terms of the attached Warrant, and tenders herewith payment of the purchase price of such shares in full.

☐ The undersigned hereby elects to convert the attached Warrant into Warrant Shares in the manner specified in Section 1.3 of the Warrant. This conversion is exercised with respect to _____ of the shares covered by the Warrant.

[Check the box next to the paragraph above that applies.]

2. Please issue a certificate or certificates representing said shares of Common Stock in the name of the undersigned or in such other name as is specified below:

Name: _____
Address: _____

_____

3. The undersigned represents that the aforesaid shares of stock are being acquired for the account of the undersigned for investment and not with a view to, or for resale in connection with, the distribution thereof and that the undersigned has no present intention of distributing or reselling such shares. In support thereof, the undersigned has executed an Investment Representation Statement attached hereto as Attachment B.

_____

HOLDER

By: _____

Title: _____

Date: _____

NOTICE OF EXERCISE

ATTACHMENT B

INVESTMENT REPRESENTATION STATEMENT

In connection with the exercise or conversion of a Warrant to purchase shares of Common Stock (the "***Warrant Shares***") of Mission Product Holdings, Inc. (the "Company"), the undersigned (the "***Holder***") hereby represents and warrants to the Company the following:

(a) Investment Experience; Access to Information. The Holder is an "accredited investor" within the meaning of Rule 501(a) of the Securities Act of 1933, as amended (the "***Act***"), and has substantial experience in evaluating and investing in private placement transactions of securities in companies similar to the Company so that it is capable of evaluating the merits and risks of its investment in the Company and has the capacity to protect its own interests. The Holder is aware of the Company's business affairs and financial condition and has acquired sufficient information about the Company to reach an informed and knowledgeable decision to acquire the Warrant and the Warrant Shares.

(b) Purchase Entirely for Own Account. The Warrant Shares are being acquired for investment for the Holder's own account, not as a nominee or agent, and not with a view to the resale or distribution of any part thereof. The Holder has no present intention of selling, granting any participation in, or otherwise distributing the Warrant Shares. The Holder further represents that it does not have any contract, undertaking, agreement or arrangement with any person to sell, transfer or grant participations, to such person or to any third person, with respect to the Warrant Shares.

(c) Restricted Securities. The Holder understands that the Warrant Shares are characterized as "restricted securities" under the federal securities laws inasmuch as they are being acquired from the Company in a transaction not involving a public offering and that under such laws and applicable regulations such Warrant Shares may be resold without registration under the Securities Act of 1933, as amended (the "***Act***") only in certain limited circumstances. In this connection, the Holder represents that it is familiar with Rule 144, as presently in effect, and understands the resale limitations imposed thereby and by the Act. The Holder must bear the economic risk of this investment indefinitely unless the Warrant Shares are registered pursuant to the Act, or an exemption from registration is available. The Holder understands that the Company has no present intention of registering the Warrant Shares. The Holder also understands that there is no assurance that any exemption from registration under the Act will be available and that, even if available, such exemption may not allow the Holder to transfer all or any portion of the Warrant Shares under the circumstances, in the amounts or at the times the Holder might propose.

_____

HOLDER

By: _____

Title: _____

Date: _____

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ARBITRATION DECISION—PARTIAL FINAL AWARD, DATED JUNE 10, 2015, BANKR. DKT. 99-2, FILED SEPTEMBER 11, 2015

AMERICAN ARBITRATION ASSOCIATION
COMMERCIAL ARBITRATION TRIBUNAL

Case No. 01-14-0001-7319

MISSION PRODUCT HOLDINGS, INC.,
Claimant,

-against-

TEMPNOLOGY, LLC, D/B/A COOLCORE,
Respondent,

PARTIAL FINAL AWARD

Claimant Mission Products Holdings, Inc. ("Mission" or "Claimant") seeks, among other things, a declaration that the Co-Marketing and Distribution Agreement (the "Agreement") (Hearing Exhibit ("Exh.") 2) between it and Respondent Tempnology, LLC, d/b/a Coolcore ("Coolcore" or "Respondent") dated November 21, 2012 remains in full force and effect. Coolcore, in turn, seeks a determination that the Agreement was terminated for cause. Also before me is the question whether, if the Agreement is in effect, Respondent has waived certain rights under it. A hearing was held in this matter on March 3-5, 2015.

BACKGROUND

The Demand in this matter was filed on October 16, 2014 and asserted a claim for breach of contract. In

particular, Mission alleged that Coolcore breached the Agreement by: improperly purporting to terminate it; refusing to fill purchase orders as required, and; failing to participate in good faith in the dispute resolution process set forth in the Agreement. Respondent, in its Supplemental Answering Statement and Amended Counterclaim, denied any wrongdoing and asserted various defenses. Specifically, Coolcore asserted counterclaims alleging that Mission: materially breached the restrictive covenant in the Agreement; failed to submit purchase orders and to purchase certain items as required under the Agreement, and; breached its branding obligations and violated Respondent's trademark.

Procedural History

Claimant's request for injunctive relief was denied as I concluded that a legal remedy in the nature of money damages was available in this proceeding. Expedited discovery was conducted. Upon consent of the parties, this proceeding was bifurcated. In the first phase of this proceeding, the following two questions were framed: is the Agreement still in full force and effect and, if so, did Coolcore waive or otherwise give up its right to require Mission to source products through Coolcore, and; did Mission violate Coolcore's branding rights under the Agreement following Respondent's notice of termination of the Agreement for cause. (Hearing Transcript at pages ("Tr.") 6-7). It was also agreed that the second stage would address whether Mission breached paragraphs 8(D) or 14 of the Agreement, assuming that the Agreement is in effect and Coolcore has not waived any rights. (Tr. 6-12, 860-866). Any claims for damages would also be addressed in the second phase of this proceeding.

The parties agree that Article 2 of Uniform Com-n.ercial Code governs this proceeding, supplemented by New York law as appropriate.

The Parties

Mission is in the business of marketing and distributing innovative sports technologies. Joshua Shaw ("Shaw") has been and is the President and CEO of Mission. Ray Sozzi ("Sozzi") was its Board Chair until April 2014 when Dennis Baldwin ("Baldwin") became Chair.

Coolcore develops, manufactures, and distributes personal cooling products. Mark Stebbins ("Stebbins") indirectly owns 53% of Coolcore. Christopher Burch ("Burch") is a Coolcore Board member and 26% owner. Two founders and employees of Coolcore, Dennis Ackroyd ("Ackroyd") and Rob Westergren, own over 17% of the company. Justin Cupps ("Cupps") was President of Coolcore until December 31, 2013 when he was replaced by Kevin McCarthy ("McCarthy"). Respondent's Management Committee consisted of the following five individuals: Stebbins, Burch, Ackroyd, Joseph Turner, and Cupps until his departure.

Key Terms of Agreement

The Agreement sets forth the rights and obligations of the parties concerning the manufacturing, marketing, and distribution of cooling products developed by Coolcore. For purposes of this phase of the proceeding, the paragraphs of the Agreement of greatest concern are those relating to the termination of the Agreement (paragraphs 3 and 4), branding and intellectual property (paragraphs 11 and 15), restrictive covenants ("Paragraph 18"), and dispute resolution (paragraph 26).

DISCUSSION

The Agreement was heavily negotiated by sophisticated parties, with numerous contingencies inserted to protect the parties' varied interests. Both parties were represented by counsel. Under its terms, the right to terminate the Agreement without cause was absolute and unconditional. To mitigate any undue injury to either party resulting from a termination without cause, a carefully negotiated set of terms were inserted that allow for a wind-down of the relationship over a two-year period.

Mission exercised its right to terminate the Agreement without cause on June 30, 2014. In doing so, Claimant bound itself to make certain contractually-agreed upon purchases of goods from Coolcore during the wind-down period. Coolcore, in turn, issued a notice of termination for cause on July 22, 2014 based on the fact that almost seven months before its President, Cupps, with whom it was parting ways at the time, asked for and was granted permission to join Mission's employ after leaving Respondent. The basis for cause, according to Respondent, was the alleged violation of Paragraph 18 and Mission's failure to expressly cite and highlight Paragraph 18 when it sought permission for Cupps to join it.

The core issues here are, even assuming that cause existed to terminate the Agreement, (a) did Coolcore waive any such claim for cause, and (b) did Coolcore waive its right to have Mission supply certain contractually-required product during the wind-down period by repudiating the Agreement.

I. **Grounds for Cause Termination, Even If Present, Were Waived**

Paragraph 18 provides that for two years after the effective date of termination of the Agreement neither party may "directly or indirectly, recruit or solicit, or employ, engage as a consultant or supplier, or otherwise retain, any of the other party's Restricted Parties who are involved in the performance of this Agreement." The term "Restricted Parties" is defined as the "other party's employees, sourcing agents and sources of supply". Cupps, as Coolcore's President, clearly was within the ambit of this provision. On this basis, Coolcore asserts that "cause" existed to terminate the Agreement given Mission's apparent breach of Paragraph 18. Mission counters by noting that Cupps and Coolcore had decided in August 2014 that Cupps would leave Respondent's employ effective December 31, 2014 and was therefore not a Coolcore employee when he began with Claimant in January 2015.[1] Cupps was, however, arguably solicited by Claimant while still a Coolcore employee (even if only for a few weeks more). Mission responds to this by denying that it solicited Cupps and instead argues that it was Cupps who solicited it and, in any event, any injury to Coolcore was de minimis.

The parties also disagree as to whether Respondent's failure to provide an opportunity to cure the al-

[1] Paragraph 18 covers "employees" who "are involved in the performance" of the Agreement. A former employee is not such an employee.

leged breach, in this case accomplished by terminating Cupps' employment, was required.[2]

The question of whether or not the solicitation of a soon-to-be-departed executive violated Paragraph 18 or whether the obligation to provide a cure period was satisfied, need not be decided, however, as I find that Respondent waived and ratified any potential breach of Paragraph 18 of the Agreement by Claimant.

1. **Stebbins Had Actual Authority to Waive Restrictive Covenant**

"Under New York law, an agent has actual authority if the principal has granted the agent the power to enter into contracts on the principal's behalf, subject to whatever limitations the principal places on this power, either explicitly or implicitly." *Highland Capital Mgmt. LP v. Schneider*, 607 F.3d 322, 327 (2d Cir. 2010), *cert. denied*, 131 S.Ct. 1045 (2011) (*citing Ford v. Unity Hosp.*, 32 N.Y.2d 464 (1973)). It is undisputed that the Coolcore Operating Agreement provides that only its President or a majority of its five person Management Committee may bind the entity. It is also un-

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[2] The Agreement required a 90 day cure period, which was not provided by Respondent when it issued its notice of termination for cause. In this case, the "cure" would have been the termination of Cupps, which Claimant attested that it was prepared to do if necessary to preserve the business relationship with Coolcore. (Tr. 567-68). Respondent argued that a cure was not possible because the damage "had already occurred and cannot be undone." (Exh. 80). This contention was undercut by the fact that Cupps had already been employed by Claimant for more than six months and testimony of Respondent's own witnesses, including its current President, who testified that he was unaware 'of any damage of any kind that was caused to Coolcore as a result of Mr. Cupps' joining Mission." (Tr. 828). Stebbins testified similarly. (Tr. 312-13).

disputed that neither the incoming President, McCarthy, nor Respondent's Management Committee formally consented to the hiring of Cupps by Mission (although Stebbins and Burch, who together own over 79% of Coolcore, did in fact consent). Nor did the Management Committee formally approve the decision to terminate the Agreement with cause. When asked, Stebbins explained that it "is true that the officers of the company have the right to take actions under the operating agreement." (Tr. 253).

At its most basic level, actual authority resides in the ability of the agent to enter into contracts and to bind the principal. Stebbins repeatedly exercised such authority.[3] For example, Stebbins took an active role on the following decisions or actions: the hiring of Cupps (Tr. 123); the hiring of McCarthy initially as a consultant (Tr. 429-30, 618); the requirement that Cupps and his family relocate to New Hampshire (Tr. 131); Cupps' separation from Coolcore (Tr. 132); the promotion of McCarthy to President and the hiring of Donna Flood as Respondent's Executive Vice President and COO (Tr. 136), and; discussions with Dennis Baldwin ("Baldwin"), a Mission board member, about his company's possible engagement by Coolcore to perform marketing services (Tr. 131). These points were made fully and authoritatively in the testimony of Cupps, Baldwin, and Shaw. Indeed, Stebbins himself in his testimony repeatedly made clear that he was the

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[3] The circumstances faced by Coolcore at the time encouraged such active involvement by Stebbins in its operations as Cupp's tenure as its President was ending as was that of Ryan Drew, its Chief Product and Marketing Officer. Further, Coolcore's Management Committee hardly, if ever, formally met and its members were far less engaged than Stebbins was in Coolcore's business.

decision-maker for key decisions. It is also notable that Stebbins failed at any time to notify Mission or its representatives that he did not have the authority that he in fact was exercising or direct Mission personnel to the Management Committee for an authorized decision-maker.

In some instances, Stebbins exercised his authority without the knowledge of Coolcore's president, for example, with the hiring of McCarthy as a consultant (Tr. 429-30), or contrary to the President's better judgment, as with the decision not to expand into footwear with Coolcore's Chinese partner (Tr. 436-37). The record is also clear that Stebbins made the decision to issue the termination for cause notice without consulting with Burch, a 26% owner of Coolcore and Management Committee member. (Tr. 318-20; Exh. 82). Indeed, Burch wrote on July 25, 2014 (after the notice of termination for cause was sent), given the speed with which Mission was selling Coolcore products "I don't understand why we don't want to be partners with them anymore." (Exh. 82).

Perhaps most revealing are the express terms of the Transition Agreement entered into by Stebbins, on behalf of Coolcore, and Cupps dated August 6, 2013. (Exh. 9). The Transition Agreement provided, among other things, that: Cupps' employment would be terminated effective December 31, 2013; he would receive severance, and; severance would be forfeited in the event that he joined a competitor. Significantly, the Transition Agreement, in paragraph 2, confirms that for the transition period Cupps would report "to the Management Committee ... through Mark Stebbins ..." In addition, Paragraph 2.7 of the Transition Agreement provided that an exit interview would be completed by "Stebbins and such other members of the Management

Committee wishing to attend." Stebbins signed on behalf of Coolcore.

Similarly, Stebbins played an active role in the negotiation of a Stock Option Agreement with Cupps which was modified at Cupps' request to eliminate Mission as a prohibited competitive employer. (Exh. 48; Tr. 324). It is notable that the Management Committee, by Resolution dated November 27, 2013, appointed Stebbins to "negotiate, execute and deliver on behalf of the Company" a stock option agreement for McCarthy as well as other new executives. (Exh. 119).

The evidence is clear. Whether because of his economic interest in the business, force of personality, or as the result of necessity, Stebbins broadly exercised the authority to enter into contracts on Coolcore's behalf with at least implicit and at times the express consent of its Management Committee. He played a key role in the hiring of senior staff, interceded when there were tensions between the contracting parties, and negotiated and executed Cupps' Transition Agreement. Coolcore, in the Transition Agreement, directed Cupps to report to the Management Committee "through Mark Stebbins" and designated him to conduct the exit interview for Cupps with no required input from the Management Committee, which could attend Cupps' exit interview if they "wish[ed]." (Exh. 9). In short, Stebbins' actual authority was found not only in the myriad decisions he made or participated in on behalf of Coolcore but also in the documents reflecting the Management Committee's designation of him as its agent.[4]

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[4] Apparent authority exists when a "principal, either intentionally or by lack of ordinary care, induces [a third party] to believe that an individual has been authorized to act on its behalf." *Peltz v. SHB Commodities, Inc.*, 115 F. 3d 1082, 1088 (2d Cir.

2. Stebbins Waived the Restrictive Covenant

Having established that Stebbins had the actual authority to bind Coolcore, the question remains did he, on behalf of Coolcore, waive its rights under Paragraph 18 of the Agreement to object to Mission's hiring of Cupps? The record is clear that he did.

"Contractual rights may be waived if they are knowingly, voluntarily and intentionally abandoned. Such abandonment may be established by affirmative conduct or by failure to act so as to evince an intent not to claim a purported advantage." *Fundamental Portfolio Advisors, Inc. v. Tocqueville Asset Mgmt, L.P.*, 7 N.Y.3d 96, 104 (2006). Waiver is present here both as evidenced by Coolcore's affirmative conduct and by its failure to act.

It is evident from the communications that Baldwin and Shaw had with Cupps in December 2014 that Mission conditioned his employment on Coolcore's agreement to it. (*See* Exhs. 22, 25, 36, and 39). Shaw wrote Cupps on December 4, 2014 that "we will need Coolcore to formally sign off on your joining our team should we reach agreement." (Tr. 524-25; Exh. 23). While there is some dispute about whether and when Cupps raised the issue with Stebbins before he was contacted by Mission[5], there is no dispute that Baldwin emailed

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1997) (internal quotation marks omitted). For many of the same reasons cited above, Stebbins also exercised the apparent authority that reasonably permitted Mission to rely on his waiver of any breach of Paragraph 18.

[5] Cupps raised the issue of possibly joining Mission at least once with Stebbins before he received the December 21st email from Baldwin. (Tr. 142-44, 456-82). Stebbins admitted that other than inquiring of counsel how Cupps' employment by Claimant impacted his severance agreement, he did not ask anybody else to

Stebbins directly on December 21, 2014 informing him that Shaw and Cupps had come to terms on Cupps joining Mission to head its business development efforts. Baldwin wrote "[b]efore Ray [Sozzi, a board member] and I approve this, we want to make sure you have been consulted on this along the way by [Cupps] and are on board with it." Stebbins responded the next morning as follows: "Dennis I just talked to Chris [Burch] ... We both are fine with Justin going to work for Mission ... best of luck." (Exh. 40).

The waiver by Stebbins on behalf of Respondent was clear and direct. This is not a situation where the alleged breach was under the radar or the contractual term was implied or indefinite. Coolcore's soon-to-be ex—President was joining its major business partner and this fact was placed directly before Respondent. A request for permission for this to happen was expressly made in writing from the Chair of Mission's Board to the Chair of Coolcore's Board, the person identified in the Transition Agreement by the Management Committee through whom Cupps was to report, and no objection or concern was raised by Stebbins — either formally or informally with Mission or Cupps.

Coolcore disagrees, however, based on its view the waiver was ineffective because Mission had an obligation to alert it and Stebbins of Coolcore's own contractual rights. Stebbins testified that he objected to the hiring of Cupps but felt that he could do nothing about it because he was unfamiliar with Paragraph 18.

Stebbins, a sophisticated and immensely successful businessman, posits that despite being deeply dis-

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take any steps to determine if there was a basis to prevent Cupps from joining Mission. (Tr. 275).

turbed by the hiring (so much so that when he "learned" of Paragraph 18 almost seven months later he concluded that Claimant's actions rose to the level of "cause" for the termination of the Agreement), he felt no need to inquire for himself or have Coolcore's counsel inquire as to Respondent's rights under the circumstances. Despite this failure on Respondent's part to perform even the slightest due diligence under the circumstances, it insists that the waiver was ineffective.[6] Not surprisingly, Respondent cites to no credible authority for the proposition that in the commercial or any other context a contracting party may not waive a contractual term unless its counterpart expressly advises it of its rights and liabilities or of the specific contractual provision invoked. It goes without saying that a party to a contract is bound by its terms whether or not it makes the effort to know or understand them. *Metzger v. Aetna Ins. Co.*, 227 N.Y. 411 (1920) ("It has often been held that when a party to a written contract accepts it as a contract he is bound by the stipulations and conditions expressed in it whether he reads them or not. Ignorance through negligence or inexcusable trustfulness will not relieve a party from his contract obligations.") It was Coolcore's responsibility to know what it was agreeing to by responding positively to Baldwin's email to Stebbins, and not Mission's duty to bear that responsibility for it. Here, at a minimum, Stebbins and Coolcore had constructive knowledge of Paragraph 18 and that is sufficient to establish the knowledge element of waiver. *See Leasing Serv. Corp, v. Diamond Timber, Inc.* 559 F. Supp. 972, 978 (S.D.N.Y.), *aff'd*, 729 F.2d 1442 (2d Cir. 1983) ("A per-

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[6] This includes not merely Stebbins but also Burch, the newly-hired McCarthy, and Coocore's entire leadership team.

son is deemed to have notice when he has actual knowledge or when "from all the facts and circumstances known to him at the time in question, he has reason to know that it exists.") (*citing Chase Manhattan Bank, N.A. v. Natarelli*, 93 Misc.2d 78, 90-91,401 N.Y.S.2d 404, 412 (Sup.Ct. Monroe Cty. 1977)). *See also* Anderson. Uniform Commercial Code [2d ed.] pp. 113-114.

Surely, Coolcore cannot be excused from the consequences of its own failure to know the terms of the operative agreement between it and its major business partner or to conduct any due diligence. As Stebbins repeatedly made clear in his testimony, he felt that Mission had engaged in a "back-handed approval process" which was "despicable" and failed to meet his expectations for the actions of responsible business partners. (Tr. 146-47). Stebbins' subjective expectations for his business partner and the legal standards applicable to this dispute, however, vary widely and those legal standards compel the conclusion that Coolcore waived any breach of Paragraph 18 that might have occurred.

3. Coolcore Ratified the Waiver of the Restrictive Covenant

The alleged breach here was open and notorious. Cupps, in his new role for Mission, dealt with Coolcore's team on a regular basis for approximately seven months and was involved in negotiations to save the relationship between the two entities. Even were it the case that Stebbins' December 22, 2013 email did not constitute an enforceable waiver, Coolcore's actions subsequent to Cupps' commencement of employment with Mission did.

By failing to act on its contractual rights in a timely fashion, Coolcore ratified Mission's actions in hiring Cupps. *Holm v. C.M.P. Sheet Metal*, 455 N.Y.S.2d 429 (4th Dep't 1982) ("Ratification is the express or implied adoption of the acts of another by one for whom the other assumes to be acting, but without authority.") (*citing* 21 NY Jur, Estoppel, Ratification, and Waiver, § 85).

One such action was the payment of severance to Cupps while he was competing with Coolcore. Even assuming that Claimant breached Paragraph 18, the award and payment of severance to Cupps was unrelated and at its full discretion. If, in fact, Coolcore and Stebbins were troubled by Cupps' working for its business partner, it would have been expected that Coolcore would enforce its own severance agreement and not make an exception for employment of Cupps with Mission.

In sum, I find that Stebbins had the authority to and did waive any rights Coolcore may have had under Paragraph 18 to object to the hiring of Cupps by Mission. In any event, Coolcare's engagement with Cupps for the seven months before it served its termination for cause notice and its delay in asserting any rights it may have had under Paragraph 18 served as a ratification of the hiring of Cupps by Mission.

II. Coolcore Repudiated the Agreement

Coolcore provided notice dated July 22, 2014 that the Agreement was terminated "effective immediately." (Exh. 80). As late as October 17, 2014, Coolcore took "the position that the Agreement between our Companies has been terminated as a result of your blatant and repeated breaches." (Exh. 96). In furtherance of its position, Respondent put Claimant on notice that

its use of Coolcore's trademarks as provided for in the Agreement constituted a violation of Respondent's rights under federal trademark law. Coolcore demanded that Mission discontinue any and all use of its trademark.

Despite having taken a clear position that the Agreement was terminated, Respondent nonetheless sought to hedge its bet by insisting that if Claimant believed that the Agreement was still in effect "please be advised that we have not waived any requirements of the Agreement to the extent that it remains in effect and you must continue to abide by it in all respects or suffer the consequences of further breaches." (Exh. 96). A party to a contract cannot renounce it and declare it terminated and then seek to hold its counterpart liable for not complying with that same agreement that it terminated. *Am. List Corp. v. U.S. News & World Report, Inc.*, 75 N.Y.2d 38, 44 (1989) (a "wrongful repudiation of the contract by one party ... [relieves] the nonrepudiating party of its obligation of future performance"); *Trilegiant Corp. v. Orbitz, LLC*, 45 Misc.3d 348, 353-54 (N.Y. Sup. Ct. 2014) (non-repudiating party need not tender performance where the contract provided for several years of ongoing services and payments). *See also* N.Y. §UCC 2-610 (buyer's repudiation of contract eliminates need for further performance by the seller); N.Y. §UCC 2-711 (buyer may cancel order where seller repudiates agreement). Here, Coolcore not only told Mission repeatedly that the Agreement was terminated effective immediately, it threatened legal action related to its trademark if Claimant made any effort to use that trademark (which it was entitled to do under the Agreement).

Moreover, the Agreement dictated how the parties were to respond when there was a good faith dispute

between them. Paragraph 3 of the Agreement provides that "[i]f there is a dispute as to whether a breach exists or has been cured, this Agreement shall remain in effect until such dispute is resolved pursuant to" the dispute resolution procedures contained in the Agreement. Mission, on several occasions reminded Respondent of this shared obligation (Exhs. 81, 83, 86). By letters dated August 1,2014, October 9, 2014, and October 17, 2014 and an email dated October 3, 2014 from McCarthy (Exhs. 85, 92, 96, and 90), Coolcore maintained its position that the Agreement had been terminated.

On August 1, 2014 Mission sent Coolcore a purchase order for woven towels. (Exh. 84). Coolcore declined to fulfill the order, offering as a basis "the current dispute over whether the Agreement is in effect we will not be accepting that order at present." (Exh. 87). McCarthy explained "[w]e just said we are going to stop right now because we are spending a lot of money developing this until we get further notice. That is why we stopped. This was costing us money." (Tr. 675-76).

Respondent points out, correctly, that Claimant notified it on July 19, 2014 that it was "reworking our go-forward plan as it related to the 2015 plan, forecast, supply chain and logistics" and would follow up the following week or so, but failed to do so. (Exh. 121). The fact that Mission was "reworking" its plans after providing notice of a termination without cause is not surprising and does not evidence an intent to breach the Agreement once in wind-down mode. If that were the case and Claimant failed to live up to its obligations,

then Coolcore had the remedies available to it under the Agreement.[7]

Similarly, Coolcore's position with respect to Mission's use of its trademark is untenable. By letter dated October 9, 2014, Coolcore took the position that due to the alleged breach of Paragraph 18 Mission's use of Coolcore's trademarks was unauthorized and constituted a violation of federal law. The Agreement also required that the parties "mutually agree" upon the placement of Coolcore's branding on the product. Such agreement did not occur nor is it reasonable to expect that Mission would include such branding on its products after having been told that Coolcore viewed any use of the branding was unauthorized and violative of federal trademark law.

In sum, Coolcore, having announced as of July 22, 2014 that the Agreement was terminated effective immediately and having maintained that position consistently for most of the next three months, clearly repudiated the Agreement. Its subsequent actions in (a) refusing to maintain the status quo until the dispute resolution process was completed, (b) withdrawing authorization for Mission to use its trademark, and (c) its failure to fill a purchase order submitted by Mission dated August 1, 2014 merely served to reaffirm Respondent's decision to repudiate. Such repudiation relieved Mission of its duty to comply with its own obligations under the Agreement, specifically to source materials from Respondent, at least until the dispute resolution process addressed the issue.

---

[7] Indeed, if Respondent had complied with the Agreement's dispute resolution provision and allowed the Agreement to remain in effect as provided for in paragraph 3, any such alleged breach would likely have been part of this proceeding.

Conclusion

For the reasons offered above, the Agreement remains in full force and effect and Mission is relieved of its obligation to source products, as otherwise provided for in the Agreement, through to the date of this Partial Final Award.

This matter will proceed to a second hearing to address any issues that may flow from Respondent's failure to abide by the Agreement after issuance of Mission's notice of termination without cause. This will include claims for alleged breaches of the Agreement and damage claims brought by Claimant.

Counsel are directed to meet and confer in a good faith effort to: narrow the issues for hearing; stipulate to facts, if possible; agree upon the scope and timing of additional discovery necessary for the hearing, and; resolve any other issues, procedural or substantive, that may be resolved prior to hearing. I note that the dispute resolution provision in the Agreement provides for mediation. In the event that the parties agree that mediation of these matters would be appropriate or is required, I will entertain reasonable requests to stay this proceeding pending completion of the mediation.

SO ORDERED.

Dated: June 10, 2015
New York, New York

[Signature]
ARBITRATOR

In the Matter of the Arbitration between

Re: 01-14-0001-7319

Mission Product Holdings, Inc., Claimant
-against-
Tempnology, LLC, d/b/a Coolcore, Respondent.

PARTIAL FINAL AWARD

I, THE UNDERSIGNED ARBITRATOR, having been duly designated pursuant to the Co-Marketing and Distribution Agreement (the "Agreement") between Claimant Mission Product Holdings, Inc., and Respondent Tempnology, LLC, d/b/a Coolcore dated November 21,2012, having been duly sworn, and having duly heard the proofs and allegations presented at the hearing, AWARD as follows:

1) Respondent waived any claim for breach of paragraph 18 of the Agreement and, except as provided in this Partial Final Award, the Agreement remains in full force and effect.

2) Respondent repudiated the Agreement and waived any entitlement to source materials for Claimant or otherwise benefit from the Agreement through to the date of this Partial Final Award.

3) A further hearing will be scheduled, in consultation with counsel, to address the issue of damages and any other issue resulting from the issuance of this Partial Final Award.

4) All claims or matters submitted to this arbitration for resolution, and not expressly granted, are herein denied.

5) This Partial Final Award is final with respect to the matters addressed herein and shall remain in full force and effect until such time as the Final Award is rendered.

[Signature]
ARBITRATOR

I, Alfred G. Feliu, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument which is my Partial Final Award.

6-10-15 [Signature]
Date Alfred G. Feliu

No. 17-1657

IN THE

Supreme Court of the United States

MISSION PRODUCT HOLDINGS, INC.,
Petitioner,

v.

TEMPNOLOGY, LLC, N/K/A OLD COLD LLC,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

JOINT APPENDIX
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PETITION FOR CERTIORARI FILED JUNE 11, 2018
CERTIORARI GRANTED OCTOBER 26, 2018

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Bk. No. 15-11400 (BAH)
Chapter 11

IN RE TEMPNOLOGY, LLC,
Debtor,

DECLARATION OF KEVIN MCCARTHY IN SUPPORT OF DEBTORS FIRST DAY PLEADINGS

Kevin McCarthy declares and says:

1. I am the Chief Executive Officer ("CEO") of Tempnology LLC (the "Debtor"). I have held this position since January 2014. In that capacity, I am familiar with the Debtor's day-to-day operations, businesses, and financial affairs.

2. As CEO, I am responsible for, among other duties and responsibilities, overseeing all financial aspects of the Debtors' business, including, financial reporting and internal controls, financial planning, taxation and risk management.

3. I have been employed by the Debtor since 2012, and I have more than 30 years of experience in brand development, sales and marketing. Prior to being employed by the Debtor, I served in senior level execu-

tive positions at KOAR, Power Balance, Perry Ellis, LA Gear, Starter, and other global consumer brands.

4. I submit this declaration pursuant to 28 U.S.C. § 1746 in support of the Debtor's first-day motions and applications filed contemporaneously herewith (the "First Day Motions"). I have reviewed the First Day Motions or have otherwise had their contents explained to me, and I believe that the relief sought in the First Day Motions is necessary to enable the Debtor to operate in chapter 11 with minimum disruption to its operations and minimum loss of value.

5. Except at otherwise indicated, all the facts set forth in this Declaration are based upon my personal knowledge, upon information supplied to me by other members of the Debtor's management or professionals, upon information learned from my review of the relevant documents, or opinion based upon my experience and knowledge of the Debtor's operations and financial condition and my experience in the textile and apparel industry generally. If called as a witness, I could and would testify to the facts set forth in this Declaration. Unless otherwise indicated all financial information contained herein is on a consolidated and unaudited basis.

6. Part I of this declaration describes the Debtors' businesses, Part II describes the circumstances giving rise to the commencement of these chapter 11 cases, Part III describes the Debtors' prepetition restructuring initiatives and Part IV sets forth the relevant facts in support of the First Day Motions.

I.

The Debtors' Businesses

A. Operations

7. Based in Portsmouth, New Hampshire, the Debtor is a material innovation company, with the front- facing brands of Coolcore and Dr. Cool.

8. Coolcore, the global leader in chemical-free cooling fabrics, has partnerships to develop fabrics for consumer brands throughout the world. The patented, chemical-free Coolcore materials deliver three distinct functions - wicking, moisture circulation and regulated evaporation - going far beyond traditional moisture–management textiles by reducing surface fabric temperature up to 30 percent lower than skin temperature when moisture is present. Coolcore fabric formulations have earned the prestigious "Innovate Technology" recognition from the Hohenstein Institute, a first for a U.S. company, and the only company globally to be awarded this recognition for "Cooling Power".

9. Coolcore fabrics are currently distributed by less than a dozen U.S. apparel and headwear companies, most of which will launch "powered by Coolcore" collections in Spring 2016. Coolcore is also currently distributed as an accessory and towel brand in select international markets such as Canada, Mexico, Israel, Australia, New Zealand, Taiwan, Hong Kong and Singapore.

10. Dr. Cool is a consumer goods brand based on the foundation of chemical–free cooling products. The brand initially launched in November of 2013 with the first and only flexible fabric wrap that combines ice and compression and has expanded into chemical–free cooling accessories and apparel. That original ice wrap in-

vention was a 2014 finalist in the ITMA Future Material Awards. All Dr. Cool products either provide relief, help someone recover, and/or refresh the wearer. The Dr. Cool wrap is in multiple markets including the U.S., Canada, Mexico, Israel, Japan, Australia, New Zealand, and India.

11. The Debtor's technology is free of chemicals, polymers, gels, crystals or phase changing materials. The fibers used to create our technology are all biologically safe. The Debtor is dedicated to the development of "Earth Friendly" performance fabrics.

12. The Debtor has an experienced operation team with personnel based in the U.S., Europe and Asia. The corporate headquarters is located in Portsmouth, New Hampshire which is responsible for innovation, design, product development & costing, sourcing, customer service and logistics. The Debtor's operations in Germany relate to textile engineering, testing oversight & coordination, innovation and costing. Finally, the Debtor's operations in Shanghai, China are responsible for finance. quality management, textile engineering, customer service, transpo1iation and logistics.

13. In 2014. the Debtor had revenues of $8.3 million and has projected revenues of $3.1 million for 2015. The Debtor has an extensive intellectual property portfolio including two patents, four additional pending patents, research studies as well as registered and pending trademarks in over fifty countries globally.

B. Corporate Structure

14. The Debtor has only one subsidiary, Granite Textile Company, Ltd. ("Granite") located in Shanghai, China which is not a debtor in this case. Granite is a wholly foreign-owned enterprise established under

Chinese law which allows the importation of components duty-free into China, to then be added to Chinese-made components and the finished product then re- exported.

C. Capital Structure

15. As of September 1, 2015, the Debtor had approximately $6.3 million of liabilities (excluding asset retirement and capital lease obligations). Of this, approximately $5.5 million was comprised of secured debt. The balance is comprised of obligations to trade creditors and contract counterparties.

(i) Secured Debt

16. In 2013, the Debtor entered into a Loan and Security Agreement (the "Existing Security Agreement") with People's United Bank and, in accordance therewith, executed and delivered a Revolving Line of Credit Note (the "Existing Note"); both the Security Agreement and the Note being dated June 4, 2013 and evidencing a loan in the original principal amount of $350,000 from People's United Bank to Borrower (the "Existing Revolving Loan").

17. In connection with the Existing Revolving Loan, People's United Bank held the Existing Security Agreement, the Existing Note, and a UCC Financing Statement filed with the New Hampshire Secretary of State, File# 130610685869 ("UCC"), and all of the other documents executed in connection therewith (the "Existing Loan Documents").

18. To secure its obligations to People's United Bank under the Existing Security Agreement, the Debtor granted People's United Bank a security interest in and to certain collateral of the Debtor as described in the Existing Security Agreement and UCC,

as security for the payment, performance and satisfaction of all of the Debtor's financial liabilities and other obligations to People's United Bank on account of, or arising from, out of or incidental to the Existing Revolving Loan.

19. On July 31, 2014, pursuant to a Purchase and Sale Agreement and Assignment and separate Assignment, by and between People's United Bank and the Schleicher & Stebbins Hotels L.L.C. ("S&S"). S&S purchased and was assigned the Existing Loan, including the Existing Secured Claims, the Existing Loan Documents, rights in the Collateral and all of the other Purchased Loan Assets (as defined in the Purchase and Sale Agreement and Assignment) and all privileges, remedies, rights, title and interest therein or thereto. A UCC amendment on Form UCC-3 assigning all of People's United Bank's rights and interest in the UCC to S&S as the secured party of record with respect to People United Bank's secured interest in the Collateral has been recorded with the New Hampshire Secretary of State, File #140804997892.

20. Thereafter the Debtor and S&S entered into a Second, and Third to Existing Revolving Line of Credit Note dated July 31, 2014, and March 25, 2015 respectively. By the Second Allonge, the term of the Existing Note was extended to July 1, 2015 and the Existing Revolving Loan Amount was increased to $2,500,000.00. By the Third Allonge, the term of the Existing Note was further extended to December 31, 2015 and the Existing Revolving Loan Amount was increased to $4,000,000.00.

21. On July 16. 2015, S&S asserted a payment default under the Existing Loan Documents and termi-

nated its obligation to provide further financing under the Existing Loan Documents.

22. On July 17, 2015, the Debtor and S&S entered into a Forbearance Agreement (as subsequently modified or amended, the "Forbearance Agreement"), which provided that S&S would forbear in pursuing its remedies until August 28, 2015 and increasing the availability under the Existing Revolving Agreement to $5,200,000.000. In accordance with the Forbearance Agreement the Fourth Allonge, the term of the Existing Revolving Loan Amount was increased to $5,200,000.00.

23. On August 17, 2015, the Debtor and S&S entered into the Amended and Restated Forbearance Agreement which increased the availability under the Existing Revolving Agreement to $5,500.000.00 .

24. As of the Petition Date, S&S hold a secured claim under the Loan Documents of $5,500,000.00 plus interest and fees against the Debtor.

(ii) Unsecured Debt

25. The Debtor and S&S are also parties to a certain Commercial Term Note dated August 15, 2013 from the Debtor to S&S in the original amount of up to $6,000,000.00, as it has been amended by the First Allonge to Commercial Term Note dated March 25, 2015 (the "Existing Term Note"). Pursuant to the Agreement Regarding Acquisition of Membership Units in Tempnology LLC dated March 25, 2015, a portion of this loan ($3,500,000.00) was converted from debt to equity interests in the Debtor. $42,073.00 of principal remains outstanding under the Existing Term Note.

26. As of the Petition Date, the Debtors also owe approximately$[—] in unsecured obligations to various

trade creditors as will be described in more detail in the Debtors' Schedules and Statements of Financial Affairs to be filed in these cases.

(iii) Ownership Structure

27. The Members and their respective percentage ownership interests in the Debtor are as follows:

Frigid Fabrics LLC	**36.93%**
S&S Hotels LLC	30.01%
Blue Wave LLC	2.46%
CCT Corp	12.28%
Mighty Moose LLC	**18.32%**

28. S&S Hotels LLC owns 68.3% of Frigid Fabrics which is equivalent to 25.2% indirect ownership of the Debtor.

II.

Events Leading to Chapter 11 Cases

29. It has become clear that the Debtor's businesses have become unsustainable without the benefits derived from reorganization under the Bankruptcy Code. After posting a profit of approximately $700,000 in 2012, the Debtor experienced net operating losses of approximately $3.4 million in 2013 and $1.9 million in 2014. At its current pace, the Debtor expects to operate at a loss of approximately $3.5 to $4.0 million in 2015. Much of this decline is a result of a certain Co-Marketing and Distribution Agreement (the "Distribution Agreement") between the Debtor and Mission Product Holdings, Inc. ("Mission")

30. As part of the contract, Mission gained exclusivity to sell Tempnology's towels, wraps, hoodies, bandanas, multichill, and do-rags. Mission also gained perpetual access without expiration to the original patent and all improvements that were completed prior to the expiration of the contract.

31. On June 30, 2014, Mission exercised its right to terminate the Distribution Agreement without cause as they were seeking to direct source their cooling products to improve margins and they wished to start promoting their own brand exclusively. As part of the contract's termination clause, the Debtor is prohibited from selling any of the Mission exclusive products in the U.S. until June 2016. Due to the retail cycle, this prevents the Debtor from reaching the full market until the 2017 season.

32. Thereafter, on July 22, 2014, the Debtor issued a notice for breach of contract based on the fact that Mission recruited and subsequently hired the Debtor's then CEO for a position within Mission. This violated the Distribution Agreement's restriction on recruiting and/or hiring persons employed by the other party during the contract period. Mission's breach called for termination of the contract and a void of any boundaries of the contract. Mission disputed whether proper cause existed.

33. As a result of the dispute arising under the Distribution Agreement the parties, in January through June 2015, participated in discovery and an arbitration hearing was held after mediation failed.

34. On June 10, 2015, the arbitrator issued his Partial Final Award ruling in favor of Mission and determining that the Debtor did not have cause to terminate the Distribution Agreement and that the two-year

wind down period was in effect. No damages have been awarded to either party at this time. The judgment included a motion to uphold the termination clause in the contract which maintains Mission's product exclusivity for two-years. Effectively, absent a rejection of the Distribution Agreement, the Debtor is prohibited from selling all of the contract exclusive products in the U.S., and a number of non-exclusive products to certain channels until June 2016.

35. As a result of the Distribution Agreement being in effect, the Debtor has asserted certain claims against Mission based on its failure to abide by the terms of the Distribution Agreement during the wind down period. The Debtor believes that its claims against Mission may be as high as $2.0 million.

36. In addition, the sports textile and garment industry is a competitive industry in a crowded field. Many of the Debtor's direct competitors consist of large multinational companies, such as Nike, Under Armor, and Adidas, who have vastly more financial resources available for advertising, distribution, and sponsorship. As a result, the Debtor has experienced significant losses despite having superior technology to its competitors.

37. Finally, as the Debtor's secured debt has increased from $350,000 to over $5 million in only two years, S&S is unwilling to continue to fund an entity sinking deeper and deeper into debt.

III.

Pre-Bankruptcy Marketing Process

38. Contemporaneously herewith, the Debtor filed its Motion for Entry of an Order (I) Approving Procedures in Connection with Sale of Substantially All of

Debtor's Assets, (B) Approving Stalking Horse Protections, (C) Scheduling Related Auction and Hearing to Consider Approval of Sale, (D) Approving Procedures Related to Assumption and Assignment of Certain Executory Contracts and Unexpired Leases, and (E) Approving Form and Manner of Notice Thereof, and (II)(A) Authorizing Sale of Substantially All of Debtor's Assets Pursuant to Successfully Bidder's Asset Purchase Agreement, Free and Clear of Liens, Claims, Encumbrances and Other Interests, and (B) Approving Assumption and Assignment of Certain Executory Contracts and Unexpired Leases Related Thereto (the "Sale Motion"). The Sale Motion contemplates a sale of substantially all of the Debtor's assets to S&S, through a credit bid plus the assumption of certain liabilities, subject to higher and better bids. The Sale Motion is a result of extensive pre-petition sales and marketing efforts.

39. Specifically, as a result of financial pressure, in July 2015, the Debtor retained Phoenix Partners L.P. ("Phoenix") as an investment banker in order to market the assets of the Debtor on a going concern basis.

40. Upon its engagement, Phoenix provided the Debtor with an information request for information including, but not limited to, the Debtor's financial history and projections, legal structure, organizational structure, products, market landscape, strategy, suppliers, customers, ownership, and intellectual property.

41. Thereafter, Phoenix met with the Debtor's Chief Financial Officer and Chief Executive Officers during July 20, 2015 through July 23, 2015 in order to evaluate the Debtor's business structure, viability, and other information in order to formulate a cohesive marketing and sales plan for the Debtor's business.

42. Prior to the Petition Date, Phoenix distributed the teaser to senior decision makers at the targeted potential strategic and financial buyers. Phoenix received three responses indicating the parties were not interested and the balance of the contacted parties chose not to respond.

43. Phoenix received on signed NDA from an interested party, but after internal discussion and cursory evaluation of the Debtor's business, the third party decided not to pursue the transaction any further.

44. Thereafter, the Debtor and its advisor met with the S&S (the proposed stalking horse bidder) on August 12, 2015, to negotiate the terms regarding a stalking horse bid and debtor-in-possession lending facility.

IV.

First Day Motions

A. ***Debtors' Expedited Motion for an Order Granting Expedited Hearing on Certain First Day Motions and Approving Shortened and Limited Notice Thereof (the "Expedited Hearing Motion").***

45. The Debtor seeks entry of an order on an expedited basis for a hearing on its various first day motions and applications on limited notice.

46. The Debtor is in immediate need of the relief it is seeking by its first day pleadings, I believe that the relief requested in the Expedited Hearing Motion is critical to this case, provides adequate notice of these cases to the Debtor's creditors and all other parties in interest, and is critical to achieving a successful and smooth transition to chapter 11. Accordingly, on behalf of the Debtor I respectfully submit that the Expedited Hearing Motion should be granted.

B. ***Debtors' Motion for Entry of Interim and Final Orders (I) Authorizing Debtors to Utilize Cash Collateral Pursuant to 11 U.S.C. §363; (II) Granting Adequate Protection to Pre-Petition Secured Creditors Pursuant to 11 U.S.C. §§ 361, 362, and 364; and (III) Scheduling a Final Hearing Pursuant to Bankruptcy Rules 4001(b) and 4001(c) (the "DIP Motion")[ADD APPROVAL OF DIP UNDER 364(D)]***

47. The Debtor has virtually no free or available cash to fund its ongoing operations. Moreover, the Debtor does not have sufficient capital to fund the Debtor's operation during the sale process. The Debtor urgently needs the use of the cash collateral and to obtain debtor-in- possession financing to purchase inventory, pay its employees, and continue its operations. Without the immediate availability of cash collateral and post-petition financing, the Debtor's operations would be severely disrupted and it would be forced to cease or sharply curtail it operations and eliminate their ability to generate revenue. The Debtor believes that the proposed post-petition financing will address the Debtor's immediate working capital and liquidity needs. In addition to providing much needed liquidity, the ability to access post-petition financing to fund operations will provide a sense of confidence in the Debtor's suppliers and employees. Without immediate access to post-petition financing, the Debtor faces a crisis that would threaten the viability of the bankruptcy case, and would likely result in the closure of the operations.

48. I believe that the relief requested in the DIP Motion is in the best interests of the Debtor's estate, its creditors and all other parties in interest and constitutes a critical element in achieving a successful and smooth transition to Chapter 11. Accordingly, on be-

half of the Debtor, I respectfully submit that the DIP Motion should be granted.

C. ***Motion for Interim and Final Orders: (I) Authorizing, But Not Requiring, Debtors to (A) Pay Prepetition Wages, Salaries, and Other Compensation and (B) Maintain Benefits Programs; and (II) Authorizing and Directing Banks to Honor All Related Checks and Electronic Payment Requests (the "Wages and Benefits Motion")***

49. In the Wages and Benefits Motion, the Debtor seeks entry of an order (a) authorizing, but not requiring, them to pay or cause to be paid, in their sole discretion, all or a portion of the amounts owing (and associated costs) under or related to Wages and Benefits, authorizing, but not requiring, them to continue, in their sole discretion, their plans, practices, programs and policies for their current Employees as those Employee Programs were in effect as of the Petition Date and as may be modified, terminated, amended or supplemented from time to time, in its sole discretion, and to make payments pursuant to the Employee Programs in the ordinary course of business, as well as to pay related administrative obligations.

50. If the requested relief is not granted, the Debtor's relationships with its employees would be adversely impacted and there could well be irreparable harm to the employees' morale, dedication, confidence and cooperation. The Debtor's business hinges on its relationships with their customers, and the ability to provide superior services is vital. The employees' support for the Debtor's efforts is critical to the success of this case. At this early stage, the Debtor simply cannot risk the substantial damage to its businesses that would inevitably attend any decline in their Employees' morale

attributable to the Debtor's failure to pay wages, salaries, benefits and other similar items.

51. I believe that the relief requested in the Wages and Benefits Motion is in the best interests of the Debtor's estate, its creditors and all other parties in interest and constitutes a critical element in achieving a successful and smooth transition to Chapter 11. Accordingly, on behalf of the Debtor, I respectfully submit that the Wages and Benefits Motion should be granted.

D. ***Debtors' Motion fir Entry of an Order Authorizing (i) Debtors to Continue to Use Existing Cash Management System and Maintain Existing Bank Accounts and Business Forms and (ii) Financial Institutions to Honor and Process Related Checks and Transfers (the "Cash Management Motion")***

52. In the Cash Management Motion, the Debtor seeks entry of an order (a) authorizing, but not directing it, to continue to operate their prepetition cash management system with respect to intercompany cash management and obligations, maintain the Debtor's existing bank accounts, and maintain the Debtor's existing business forms. Without the requested relief, the Debtor would have great difficulty maintaining its operations, which could cause grievous harm to the Debtor and its estates.

53. I believe that the relief requested in the Cash Management Motion is in the best interests of the Debtor's estate, its creditors, and all other parties in interest and constitutes a critical element in achieving a successful and smooth transition to chapter 11. Accordingly, on behalf of the Debtor, I respectfully submit that the Cash Management Motion should be granted.

E. ***Motion Of Debtor Pursuant To Bankruptcy Code Sections 105(A) And 366 (A) Approving*** **Debtor's** ***Proposed Adequate Assurance Of Payment To Utility Companies, And (BJ Prohibiting Utility Companies From Altering, Refusing Or Discontinuing Service (the "Utilities Motion")***

54. In the Utilities Motion, the Debtor seeks entry of an order determining that the Debtor's proposed offer of deposits provides the Utility Providers listed in the Motion with adequate assurance of payment within the meaning of Section 366 of the Bankruptcy Code and prohibiting the Utility Providers from altering, refusing or discontinuing any utility services on account of prepetition amounts outstanding or on account of any perceived inadequacy of the Debtor's proposed adequate assurance.

55. The Debtor currently utilizes utility services in their operations provided by certain Utility Providers as described in greater detail in the Utilities Motion. Because the Utility Providers provide essential services, any interruption in such services would prove devastating to the Debtor's ability to continue its operations. The temporary or permanent discontinuation of utility services at the Debtor's offices, warehouses, and related operations would severely restrict the Debtors' ability to continue operating and could cause irreparable harm. Uninterrupted utility services are essential to the Debtor's ongoing operations.

56. I believe that the relief requested in the Utilities Motion is in the best interests of the Debtor's estate, its creditors and all other parties in interest and constitutes a critical element in achieving a successful and smooth transition to Chapter 11. Accordingly, on

behalf of the Debtor, I respectfully submit that the Utilities Motion should be granted.

F. ***Debtor's Motion to Honor Returns and Exchange Policies (the "Customer Motion")***

57. In the Customer Motion, the Debtor seeks entry of an order authorizing, but not directing, the Debtor to continue to honor its return and exchange policies. Such policies are essential to allow the Debtor to maintain its important customer base. Alienation of the Debtor's customers will result in irreparable harm to the Debtor's operations. Moreover, as many of the costs associated with returns and exchanges falls on the Debtor's suppliers - the relief requested has little to no actual impact on the Debtor's available cash flow.

58. I believe that the relief requested in the Customer Motion is in the best interests of the Debtor's estate, its creditors and all other parties in interest and constitutes a critical element in achieving a successful and smooth transition to Chapter 11. Accordingly, on behalf of the Debtor, I respectfully submit that the Customer Motion should be granted.

G. ***Debtor's Motion For an Order Under Bankruptcy Code Sections 105(a), 363(b), 506, 1107(a) and 1108 Authorizing Payment of Certain Prepetition Shipping, Warehousing, and Delivery Charges (the "Shipping and Warehousing Motion")***

59. In the Shipping and Warehousing Motion, the Debtor seeks an order authorizing, but not requiring, it to pay prepetition Shipping and Warehousing Charges to third party shippers, haulers, warehousemen, common carriers, armored couriers, and other transporters (that the Debtor determines, in the exercise of its business judgment, are necessary or appropriate to obtain

the release of goods in the possession of such parties and to satisfy the liens, if any, in respect of amounts owed to such parties. The Debtor estimates that the prepetition Shipping and Warehousing Charges to be paid under this Motion are collectively no more than $50,000.

60. The Debtor relies extensively on their Shippers and Warehousemen to distribute and transport goods, merchandise, and products from the production lines in China to its customers in the U.S. and abroad. The Debtor also relies on Shippers and Warehousemen to deliver goods to customers and to return goods to the Debtor's vendors. The services provided by these Shippers and Warehousemen are critical to the day-to-day operations of the Debtor's business.

61. I believe that the relief requested in the Shipping and Warehousing Motion is in the best interests of the Debtor's estate, its creditors and all other parties in interest and constitutes a critical element in achieving a successful and smooth transition to Chapter 11. Accordingly, on behalf of the Debtor, I respectfully submit that the Shipping and Warehousing Motion should be granted.

I, the undersigned Chief Executive Officer for the Debtor, declare under penalty of perjury that the foregoing is true and correct.

Dated: September 1, 2015

/s/ Kevin McCarthy
Kevin McCarthy
Chief Executive Officer

EXCERPTS OF OCTOBER 2, 2015 BANKRUPTCY COURT HEARING TRANSCRIPT

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE

Case #15-11400-JMD

Manchester, New Hampshire
October 2, 2015
9:13:36 A.M.

IN THE MATTER OF TEMPNOLOGY, LLC,
Debtors,

TRANSCRIPT OF HEARING RE: MOTION OF THE DEBTOR FOR ENTRY OF INTERIM AND FINAL ORDERS: (I) AUTHORIZING THE DEBTOR TO OBTAIN POST-PETITION FINANCING; (II) AUTHORIZING THE USE OF CASH COLLATERAL; (III) GRANTING ADEQUATE PROTECTION; AND (IV) SCHEDULING A FINAL HEARING, DEBTOR'S MOTION FOR ENTRY OF AN ORDER (I)(A) APPROVING PROCEDURES IN CONNECTION WITH SALE OF SUBSTANTIALLY ALL OF DEBTOR'S ASSETS, (B) APPROVING STALKING HORSE PROTECTIONS, (C) SCHEDULING RELATED AUCTION AND HEARING TO CONSIDER APPROVAL OF SALE, (D) APPROVING PROCEDURES RELATED TO ASSUMPTION AND ASSIGNMENT OF CERTAIN EXECUTORY CONTRACTS AND UNEXPIRED LEASES, AND (E) APPROVING FORM AND MANNER OF NOTICE

THEREOF, AND (II)(A) AUTHORIZING SALE OF SUBSTANTIALLY ALL OF DEBTOR'S ASSETS PURSUANT TO SUCCESSFUL BIDDER'S ASSET PURCHASE AGREEMENT, FREE AND CLEAR OF LIENS, CLAIMS, ENCUMBRANCES AND OTHER INTERESTS, AND (B) APPROVING ASSUMPTION AND ASSIGNMENT OF CERTAIN EXECUTORY CONTRACTS AND UNEXPIRED LEASES RELATED THERETO, AND DEBTOR'S OMNIBUS MOTION TO REJECT CERTAIN EXECUTORY CONTRACTS NUNC PRO TUNC TO THE PETITION DATE BEFORE THE HONORABLE J. MICHAEL DEASY, J.U.S.B.C.

Electronic Sound Recording Operator: Gayle Llewellyn

Proceedings Recorded by Electronic Sound Recording
Transcript Produced by Certified Transcription Service

[2]

APPEARANCES:

For the Debtor: CHRISTOPHER M. DESIDERIO, ESQ.
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For Schleicher & Stebbins Hotels, LLC:
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For Mission Products Holdings, Inc.: ROBERT J. KEACH, ESQ.
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Hillsborough, New Hampshire 03244

* * *

[82] debtor and Mission may have some disagreement about the meaning of rejection. This – because – because what you really have a difference of opinion over is in the context of this case what is – in this agreement what does 365(n) mean? That's what the disagreement is about.

MR. SKLAR: Correct.

THE COURT: Yeah. I – you know, I don't know the answer to that but I'm not sure on these pleadings that they're teed up for the Court to answer that question. In any event. All right. Anything else?

MR. SKLAR: No, Your Honor.

MR. KEACH: Yes, Your Honor, briefly on that. I think we just agree the effect of rejection is not ripe today. I may even take an adversary proceeding or a declaratory judgment action, but it's clearly not within a summary 365 rejection proceeding. The limit – the issues in the 365 proceeding are very limited and they're limited to whether they can reject or not. The effect of that rejection is for another day and another hearing.

THE COURT: All right. You don't disagree with Mr. Sklar's allegations, plain offer of proof that at least since June 10th there have been no sales by Mission?

MR. KEACH: I – Your Honor, I can't –

THE COURT: Right.

MR. KEACH: – validate that –

THE COURT: You don't know.

[83] MR. KEACH: – or not validate that.

THE COURT: You don't know.

MR. KEACH: I don't have that information.

THE COURT: All right. No, that's all right. You're not prepared to ar – to contest it either?

MR. KEACH: No. But I'm also not prepared to admit that he's a –

THE COURT: Yeah.

MR. KEACH: – witness that can testify to it either.

THE COURT: Oh, I don't think he's a witness who can testify. I mean, I take that as an offer of proof or I can take it as an allegation.

MR. KEACH: Right. Yeah, but his witness is not here either. So the – I think, Your Honor, you can –

THE COURT: But it's fair to say from looking at the record I have here, as thin as it might be, that your client has not exactly set any sales records with this product over recent time?

MR. KEACH: I think, Your Honor, on the issue of rejection whether we have or have not performed is not the issue. It's whether or not we had an obligation to perform. And I think that you can determine mutual obligations in that limited respect from the contract. For the purposes of getting us through today I don't mind saying that the contract is evidence. I think both parties have attached it to pleadings. So I think you can rule on the motion to reject as far as it [84] goes. I don't think the effect of rejection is in any way ripe.

THE COURT: Yeah. The contract in the arbitrator's award were attached by somebody to something. Actually –

MR. KEACH: Correct.

THE COURT: – I think you attached it to something.

MR. KEACH: Yeah. No. I said I think both parties admit of – have admitted that those things are in. Both parties have referred to them. I don't mean to suggest –

THE COURT: Yeah.

MR. KEACH: – that you can't look at it.

THE COURT: Yeah.

MR. KEACH: I think you can decide whether they can or cannot reject. I think the scope of rejection, the effect of rejection is a matter for another day. It's just not ripe on these pleadings.

MR. SKLAR: Your Honor, my witness is here. And Mr. Ferdinand is the CFO of the debtor company.

THE COURT: Well, you want to make an offer of proof?

MR. SKLAR: Zero –

THE COURT: Well, if you just make an offer of proof. I mean, I don't know that I want to take the time to put him on the stand if there's no real dispute. What – what's he going to say about rejection? That's all he's going to testify to, right, the merits of the motion which is rejection, not 365(n).

MR. SKLAR: Right. I'm just to the point that was [85] raised with respect to the sales volumes since June 10th of 2015.

THE COURT: And what's he going to say?

MR. SKLAR: Zero.

THE COURT: Okay.

MR. KEACH: I'll allow the offer to – of proof to go in, Your Honor. I think it's irrelevant on the point. Again, it's – but –

THE COURT: Yeah.

MR. KEACH: I'm happy to have it come in.

THE COURT: All right. Well, we've saved the time to have him to say it.

MR. SKLAR: Sure.

THE COURT: It's in, it's in. It means what it says. All right. Well, the – this is a debtor's motion to reject a co-marketing distrib – and distribution agreement between the debtor and Mission Product Holdings, Inc. The first, Mission takes the position that this is not even an executory contract, therefore, the motion should be denied as moot I guess is what they're really saying.

The Court is going to find that – I think this is an executory contract because under its somewhat unique pos – provisions the termination of this contract, absent material breaches, is basically done by a notice which sets a two-year period running. And during that two-year period, at least from the terms of the contract, it appears it just remains in force

* * *

AMENDED EXAMINER'S REPORT (WITH EXHIBIT 1, BANKR. DKT. 270-1), BANKR. DKT. 270, FILED NOVEMBER 24, 2015

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Chapter 11
Case No. 15-11400-JMD

IN RE: TEMPNOLOGY LLC,
Debtor

AMENDED EXAMINER'S REPORT

NOW COMES Michael S. Askenaizer, Chapter 11 Examiner in the above-captioned matter, by and through his attorneys, Ford & McPartlin, P.A., and submits the following report:

INTRODUCTION: EXAMINER'S ROLE

On September 23, 2015, the United States Trustee filed an *Ex Parte* Application for Order Approving Appointment of Examiner [Docket No. 164], pursuant to this Court's Order Granting Motion to Appoint Examiner. [Docket No. 138] appointing Michael S. Askenaizer as Examiner. See, Order dated September 24, 2015 [Docket No. 171] (confirming his appointment).

The Examiner was appointed pursuant to 11 U.S.C. § 1104(c) to investigate:

a. the negotiation and execution of the proposed stalking horse agreement ("**Agreement**") between

the Debtor and Schleicher & Stebbins Hotels L.L.C. (**"S&S Hotels"**);

b. the amount, validity and priority of S&S Hotels' claims and liens;

c. the value of the assets (**"Assets"**) to be sold through the Agreement;

d. the identification of all existing liens or secured claims against the Assets;

e. whether and to what extent the Debtor has engaged in adequate marketing efforts with regard to the Assets;

f. specific liabilities to be assumed through the Agreement; and

g. whether the Debtor's proposed bidding procedures and form notice of sale [Court Docket No. 34] should be amended, clarified or supplemented.

The Court's Order Directing the U.S. Trustee to Appoint an Examiner required that the Examiner submit his initial report to this Court on or before seven (7) days of his appointment. [Docket No. 138, ¶3]. As required by this Court's order directing his appointment [Docket No. 138 ¶3], the Examiner submitted his initial report on September 30, 2015. [Docket No. 180]. The Court further directed the Examiner to prepare and file with the Court a report with regard to the sale process. [Docket No. 138, ¶5]. The Examiner submits this as his final report. This report incorporates the Initial Report in full. The Initial Report is attached hereto as Exhibit 1. The Initial Report completely dealt with items a, b, d and g above. This Final Report will be limited to c, e and f above.

THE AUCTION PROCESS AND RESULT

The auction sale was held on November 5, 2015 at the offices of Debtor's counsel Nixon Peabody, in Manchester New Hampshire. There were two bidders: Mission Product Holdings, Inc. ("Mission") and Schleicher & Stebbins Hotels LLC ("S&S"). Each bidder attended with counsel. The proceedings were transcribed. The Debtor's Counsel (assisted by Debtor's advisor Phoenix Capital) conducted the auction. The auction proceeded in rounds. At the conclusion of each round the Debtor announced its valuation of the offer and announced which bid was the highest and best. Minimum bid increments were $100,000. The bid of S&S was $750,000 as a credit bid of post-petition financing. The initial overbid of Mission was $1,300,000 in cash.

Before the bidding began there was a discussion of the state of the Debtor's current assets and post-petition current liabilities. The discussion yielded an understanding that as of the date of the auction the Debtor's post-petition current assets and current liabilities were approximately:

Current Assets	**Book**	**Liquidation**
Cash	$600,000.00	$600,000.00
Accounts Receivable	$100,000.00	$80,000.00
Inventory	$1,200,000.00	$120,000.00
Total Current Assets	***$1,900,000.00***	***$800,000.00***
Current Liabilities		
Post-petition AP	$50,000.00	$50,000.00
Total Post-petition Current Liabilities	$50,000.00	$50,000.00
Net	**$1,850,000.00**	**$750,000.00**

The Asset Purchase Agreement which was the basis of the auction and was made part of the Bid Procedures (See, Order October 8, 2015, Docket Entry No. 194) conveys to the successful purchaser all assets of the Debtor including cash, inventory and accounts receivable and conveys those asserts free of any claims including free of any post-petition accounts payable.

The first bid at the Auction was by S&S of $1,400,000 consisting of the credit bid of post-petition debt of $750,000 plus a credit bid of pre-petition debt of $650,000. After some skirmishing reserving rights about the credit bid of pre-petition debt, Mission bid $1,500,000 consisting of its original bid of $1,300,000 and $200,000 provided by an agreement not to acquire $200,000 of the estate's cash.[1]

The use of estate cash to provide a portion of the consideration resulted in a series of rounds of bidding with various structures each using various estate assets to increase the bid without requiring the bidder to provide additional funding. That structure resulted in the Debtor and its professionals making a declaration that for the purposes of the bid process, inventory and accounts receivable would be valued at a discount intended to reflect liquidation value. Therefore, the $1,200,000 in inventory (primarily finished goods) would be valued at 10% and the accounts receivable would be valued at 80%.

There was also some discussion as to the appropriate treatment of post-petition Accounts Payable the result of which was that some of the bids included a

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[1] In essence a modification of Schedule 2.1 of the asset purchase agreement. *See Bid Procedures Order*, Docket No. 194, p. 49.

commitment to pay post-petition accounts payable which commitment was valued at $50,000.[2]

After multiple rounds the last bid by Mission (under protest[3]) was $2,600,000, consisting of new cash tendered by Mission of $1,800,000 and $800,000 arising from the deletion from Schedule 2.1 of the current assets of the Debtor valued by the Debtor for the purposes of the auction at liquidation value.[4]

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[2] The Debtor's management seemed a bit confused about the amount or concept of post-petition accounts payable. At the start of the process management reported to the participants that the amount of post-petition accounts payable as $350,000. However, that number was later declared by management to be wrong and that the true amount was approximately $50,000. The error apparently being that management treated the $300,000 of pre-petition accounts payable that the S&S offer would assume as post-petition which it is not. *See, §2.3 (iii)* of the Asset Purchase Agreement, Docket Entry No 194, p. 24.

[3] Whenever a Mission bid was after a S&S bid which included the credit bidding of pre-petition debt, Mission announced that its bid was "under protest." Mission's apparent intent was that if its subsequent challenge to the Credit Bid was upheld then it would seek to have its last bid before the first such bid of pre-petition debt declared the highest and best offer.

[4] The Examiner believes that the manner of valuation used at the auction was satisfactory for the purposes of the auction but for no other purposes. In particular, the only uses of valuation at the auction are: (a) to create an ordinal ranking of the bids; and (b) to provide some assurance that the minimum bid increment required by the Bid Procedures Order is satisfied. In light of the Debtor's right to amend the Bid Procedures in its reasonable discretion (See Bid Procedures Order §IV ¶11 [Docket No. 194 p. 17], the most important purpose was to create an ordinal ranking and a level playing field. Hence, technical accuracy or precision to the valuation used are not important and the real value of the bid to the Estate may vary greatly from the nominal value used at the auction.

S&S's final bid (and the winning bid) was $2,700,000 consisting of the following components:

	Auction Value	**Face Value**
Post Petition Credit Bid	$750,000.00	$750,000.00
Assumption of Schedule F Debts	$657,000.00	$657,000.00
Accounts Receivable	$80,000.00	$100,000.00
Inventory	$120,000.00	$1,200,000.00
DIP Cash	$600,000.00	$600,000.00
Assumption of Post-petition Accounts Payable	$50,000.00	$50,000.00
Credit Bid pre-petition Debt	$443,000.00	$443,000.00
Total Nominal Bid	**$2,700,000.00**	
Total Face Value		$3,800,000.00

The effect of that bid structure is that if the bid is approved then this chapter 11 case will result in a 100 cent dividend to the Schedule F creditors (except Mission), payment in full of the post-petition creditors, and assets in the estate available to satisfy the Mission Claim if and when it is filed.[5] Assuming that an Order approving the Bid enters on November 18, 2015, then the Closing would be approximately November 23, 2015

[5] It is the Examiner's understanding that all employees on Schedule E have been paid in full pursuant to the first day orders and in particular pursuant to the Order entered September 4, 2015, Docket Entry No. 55.

(two business days thereafter)[6]. The value of the bid then depends in part on the value of the assets and the amount of the liabilities existing at that time. For example the value could look like the following:

	Auction Value	**Value at Closing**	**Assets Left in Estate**[7]
Post-Petition Credit Bid	$750,000.00	$750,000.00	
Assumption of Schedule F Debts	$657,000.00	$657,000.00	
Accounts Receivable	$80,000.00	$100,000.00	$100,000.00
Inventory	$120,000.00	$1,000,000.00	$1,000,000.00[8]

[6] However, the Debtor has advised the Examiner that the closing will likely occur three (3) to four (4) weeks after approval of the sale.

[7] For the purposes of illustration, the Examiner assumes that the ongoing operation from the date of the auction (November 5, 2015) to the date of closing will result in some bleed of assets. Hence, even though the estate had $600,000 on November 5, 2015, the likelihood is that there will be only the $400,000 necessary for the professionals' carveout at closing. Even though there was $1,200,000 in finished goods inventory at the auction date, there is likely to be less at closing. Even though there were $50,000 in post-petition payable at the auction date, there are likely to be fewer at closing because operations seem to have ramped down. Even with that kind of bleed, there remains a likelihood that there will be assets with substantial reorganization value in the estate. The examiner has inquired of the Debtor what its projections show. The Debtor has responded that it anticipates remaining inventory at closing of $1,100,000 to $1,200,000 valued at the lower of cost or market with a closing in mid-December. The Debtor also anticipates requiring additional post-petition financing.

DIP Cash	$600,000.00	$0.00	$0.00
Assumption of Post-petition Accounts Payable	$50,000.00	$50,0000.00	
Credit Bid pre-petition Debt	$443,000.00	$443,000.00	
Total Nominal Bid	$2,700,000.00		
Total Value at Closing		$3,000,000.00	$1,100,000.00

The structure of the bid means that immediately after closing there are substantial assets left for creditors the largest of which is inventory. The assets left are available to satisfy the remaining claim of Mission if Mission is correct that all of the pre-petition S&S debt should be re-characterized as equity. If Mission is incorrect and the S&S pre-petition debt may not be re-characterized as equity then the S&S security interest reaches all of those assets.

The value of the assets left at Closing is uncertain. But, if the Closing occurs quickly after the approval of the sale, then the value of the assets cannot vary too much from the representations made at the auction. The largest value as represented at the auction was the inventory. The inventory is almost all finished goods

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[8] Mission asserts that "it could liquidate [the inventory] for the estate at cost or higher." *Mission Product Holdings, Inc.'s Objection to Conduct of Auction and Sale*, [D.E. 244], p. 6.

inventory. The likely buyer of the inventory is S&S which (after Closing) will have just acquired a business with potential sales orders and no inventory. It will need inventory to generate accounts receivable and to satisfy its customers. The logical result should be that S&S will acquire the inventory from the estate at something close to cost and not at liquidation because its alternative is cost, but with a delay equal to the time to manufacture.

The bid structure that was finally declared successful should result in a substantial pool of value that S&S and Mission can fight over as long as they want with the rest of the creditor body paid in full, the employees paid in full and the business generating jobs for the community.[9] The Examiner's view is that the auction, if approved and closed promptly, achieves the fundamental goals of the bankruptcy process.

THE EXAMINER'S EVALUATION

The value of the bid and that bid structure has to be evaluated under three scenarios: (a) if the S&S debt is not re-characterized; (b) if the S&S debt is re-characterized in an amount sufficient to make a difference and the Mission claim has no administrative component; and (c) if the S&S debt is re-characterized in an amount sufficient to make a difference and the Mission claim has an administrative component.

A. *First Scenario: No Re-characterization.* If S&S prevails on the re-characterization issue in an

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[9] Despite requests made by the Examiner and others, Mission has been unable or unwilling to articulate the exact amount and nature of its claims, other than to assert that the claim is in seven (7) figures and that it holds a substantial administrative claim.

amount in excess of $2,250,000 (the reorganization value of the Successful Bid at closing less the post-petition credit bid) then value of the bid to the estate is greater than any available alternative. All claims other than Mission are paid in full and Mission's (unliquidated) claim either: (a) is an unsecured claim that will be paid, if at all, out of the other Chapter 5 recoveries; or (b) is an administrative claim that will be paid out of other Chapter 5 recoveries. It is possible that Mission's claim would make impossible the confirmation of a plan of reorganization; but, the inability of the sale to support a confirmable plan does not mean that the sale is not in the best interests of the estate. If S&S sufficiently prevails on re-characterization and if Mission prevails on the theory that its claim is administrative in nature, then no plan is possible in this administratively insolvent estate.[10]

B. *Second Scenario: S&S's Pre-petition Claim is Re-characterized as Equity in an Amount Sufficient to Make a Difference and Mission Has Only a General Unsecured. Claim.* If S&S's claim is completely re-characterized as equity and assuming that the Credit Bid of the Pre-petition claim cannot be recovered from S&S then the transaction leaves approximately $1,100,000 to satisfy the Mission claim and pays all other claims in full and satisfies the post-petition loan, giving the transaction a value to the estate of more than $2,500,000. The only circumstance in which there is any argument

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[10] 11 U.S.C. §1129(a)(9)(A); *Cf., In re SPM Mfg. Corp.*, 984 F.2d 1305, 1315 (1st Cir. 1993)

about that outcome is if Mission has a claim substantially greater than $1,000,000. If the Mission Claim is less than $1,000,000 and is allowed as an unsecured claim, and the S&S pre-petition debt is completely re-characterized as equity then the transaction leaves Mission a substantial possibility that it will be paid in full. The result of the transaction as structured is better than the alternative. Because Mission has not bound itself to act as a back-up bidder at any price, the alternative to the Sale Transaction is liquidation. On liquidation, the Examiner believes that the values used by all the parties at the auction are of the correct order of magnitude. At liquidation, the funds available for the satisfaction of all unsecured claims, including Mission's would be a few hundred thousand dollars. The likelihood is that if there is complete recharacterization of the S&S pre-petition claim and if Mission is allowed an unsecured claim, then Mission would receive more through the sale transaction than it would in any realistic alternative.

C. *Third Scenario: S&S's Pre-petition Claim is Re-characterized as Equity in an Amount Sufficient to Make a Difference and Mission is Allowed an Administrative Claim.* Mission argues that it's rights under the Co-Marketing Agreement to an exclusive marketing territory are protected by 11 U.S.C. §365(n) and that the sales by the Debtor post-petition give rise to post-petition administrative claims for the breach of that exclusive marketing agreement. This Court rejected that argument. The

> Court's order is not a final order.[11] Even if Mission prevails on appeal, the administrative claim is unlikely to be more than the gross profit earned by the Debtor on the sales in violation of the agreement. The gross profit earned by the Debtor in the month of September, 2015, was approximately $158,000. So, if the sale is concluded quickly, the maximum administrative claim that Mission could assert would be on the order of approximately $300,000. The sale creates a pool of assets from which that sum could be paid while still paying other creditors. Liquidation, on the other hand, would likely assure no payment to any other creditors. Liquidation, rather than this sale, will result in the realization of the liquidation value for the assets remaining in the estate which will be about $800,000. The allowed post-petition claim of S&S will be $750,000 (plus interest and costs). Therefore, liquidation substantially increases the likelihood that Mission's administrative claim would not be paid and virtually assures that no other creditor will receive any payment.

The Examiner concludes that the likelihood is that Mission and all other creditors will receive better treatment through the sale transaction than would occur in the only realistic alternative which is liquidation.[12]

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[11] On November 12, 2015, Mission filed its appeal (Docket Number 242).

[12] At the auction in an off the record conference between Mission and the Examiner, Mission's counsel asked the Examiner to support it and if the Examiner did and if there was a successful complete re-characterization challenge to the S&S pre-petition debt it would purchase the assets for $2,600,000 by the payment of

MARKETING THE ASSETS

In his Initial Report, the Examiner discussed the pre-petition attempts to market the business and the contacts that the Debtor's professional had made with prospective purchasers. Pre-petition Phoenix Capital contacted fifteen (15) prospects including, 3M Company, Gordon Brothers, and Hilco Equity Partners, among others. Since the petition date, Phoenix contacted 164 potentially interested parties via email with 112 follow-up calls. Six companies requested Non-Disclosure Agreements and four signed non-disclosure agreements. Only one company, Mission, submitted a bid.

The Debtor's professionals, Phoenix Capital Resources, performed a search for likely prospects. The search began with a search through a database maintained by McGraw Hill Financial for the purpose of assisting this kind of investment banking effort. The database is known as "S&P Capital IQ." The database together with a similar database maintained by Phoenix Capital Resources and the management of Tempnology, was the source of contact information and the identification of prospects. Phoenix Capital then developed and emailed a marketing teaser and bid procedures memo to the companies and contacts identified as potential buyers. The companies contacted included Under Armour, Adidas America, Inc., New Balance, Nike, Performance Apparel, LLC., Columbia Sports-

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$1,800,000 in cash and leaving the accounts receivable, estate cash and inventory in the bankruptcy estate. The offer is not in writing and so not enforceable. The offer is contingent on a successful litigation outcome that could take years. In addition, as discussed below, the Examiner does not believe that complete re-characterization is likely to be successful.

wear Company, Trek Bicycle Corporation, and many others. The complete list is on the attached Exhibit 2.

Phoenix Capital received responses from twenty six (26) parties that they were not interested. Phoenix followed up with one hundred and seventeen phone calls and one hundred seventy-seven emails of various kinds including individual follow-up emails, question responses, and follow-up for NDA's. Phoenix Capital reports that its marketing effort resulted in an average point of contact of 2.66 times per company on the Master Contact List. Phoenix has confirmed to the Examiner that the method of soliciting interest was the same method that would have been used in any similar situation whether in or outside the bankruptcy court.

Phoenix tracked the substance of the responses and why various potential parties did not submit bids. The responses were (in order of frequency):

a. The opportunity is too small;

b. Do not have the resources to dedicate to this right now;

c. Given the loss history, there is no enterprise value for this business;

d. No real sales;

e. Too early stage;

f. Too much market saturation for the technology – everyone has a similar product and it is too hard to differentiate; and

g. Not comfortable with the defensibility of the patents.

Phoenix has opined to the Examiner that it does not believe that additional time would have produced additional bids. Phoenix has indicated to the Examiner that there are too many hurdles to overcome including: the Debtor's size, sales history, history of losses and the oversaturation of the technology in the marketplace.

The only thing the Examiner can say with certainty about the marketing is that it did not work. The only entities that submitted a bid were entities that are already enmeshed in this business. That could be because the marketing was insufficient or it could be because the business does not have value.

The Examiner is inclined to believe that the marketing realized the value inherent in the business by reason of the reports and conversations with Phoenix and by reason of the conduct and bidding by the parties. First, neither party seems to value the patent rights. The Debtor does not have exclusive rights to the patents and yet S&S continues to fund the business and fight to obtain it.

Second, the history of the Debtor appears to include determinations in the past not to defend the patent rights.

Third, Mission stopped bidding (even under protest) at $2,600,000 despite its financial ability to continue bidding. It appears to be Mission's view that the value of the exclusive right to all of the intellectual property of the Debtor is less than, and substantially less than, the face amount of the S&S secured pre-petition claim. If the value of the assets was substantially more than the face amount of the S&S Secured pre-petition claim, then Mission could have obtained those assets and profited from them by bidding sub-

stantially more than it did (preserving still its claims and providing a fund to pay those claims). The fact that it stopped bidding at $2,600,000 is some indication that the value of the assets was and is less than $3,000,000.

If the value is in fact less than $3,000,000 and S&S has the right to credit bid up to $4,300,000 ($750,000 post-petition financing, $3,550,000 in secured pre-petition debt[13]) then no amount of additional marketing is going to yield a transaction with a greater return to creditors.

It may be that, in the alternative, if S&S's pre-petition secured debt is re-characterized in total, then the marketing materials suppressed interest between $3,000,000 and $6,700,000 because they referred to the Credit Bid Right. But that problem arises from the terms approved by the Court and not from any absence of effort to market the assets. In any event there appears to be no evidence of such a chilling effect. In the analogous foreclosure sale situation where the secured creditor is credit bidding, it is common for bidders who are interested but put off by the potential credit bid to express that concern. Phoenix Capital tracked the common expressions of concern and none of them relate to the amount of the credit bid potential.

The Examiner believes that the problem is the limited value of the business as expressed by the potential purchasers and that additional or different marketing is not likely to have yielded a better or different result.

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[13] *See*, Examiner's Report discussion at p. 17 below.

RECHARACTERIZATION AND EQUITABLE SUBORDINATION

Re-characterization and equitable subordination are fundamentally different analyses. Re-characterization does not require misconduct. *In re A.F. Walker & Son, Inc.*, 46 B.R. 186, 190 (Bankr. D.N.H. 1985) (Noting that the "evolving standard, which does not require a showing of 'actual misconduct'"). Equitable subordination on the other hand does require misconduct. *Matter of Mobile Steel Co.*, 563 F.2d 692, 699-700 (5th Cir. 1977)(noting three conditions to equitable subordination: inequitable conduct, which "resulted in injury to the creditors of the bankrupt or conferred an unfair advantage on the claimant" and "[e]quitable subordination of the claim must not be inconsistent with the provisions of the" Code).

RE-CHARACTERIZATION

The Bankruptcy Court for the District of New Hampshire has dealt with re-characterization in a number of cases. Judge Vaughn described the analysis:

> this Court generally considers the following eleven factors:(1) the names given to the instruments, if any, evidencing the indebtedness;(2) the presence or absence of a fixed maturity date and schedule of payments;(3) the presence or absence of a fixed rate of interest and interest payments;(4) the source of repayments;(5) the adequacy or inadequacy of capitalization;(6) the identity of interest between the creditor and the stockholder;(7) the security, if any, for the advances;(8) the corporation's ability to obtain financing from outside lending institutions;(9) the extent to which the advances were subordinated to the claims of outside

> creditors;(10) the extent to which the advances were used to acquire capital assets;(11) the presence or absence of a sinking fund to provide repayments. *In re Micro–Precision Techs. Inc.*, 303 B.R. 238, 246 (Bankr.D.N.H.2003) (*quoting In re AutoStyle Plastics, Inc.*, 269 F.3d 726, 749–50 (6th Cir.2001).
>
> Recharacterization does not hinge on any one particular factor, and "[t]he more [a transaction] appears to reflect the characteristics of ... an arm's length negotiation, the more likely such a transaction is to be treated as debt." *Id.* at 246–47 (alterations and omission in original) (*quoting In re AutoStyle Plastics, Inc.*, 269 F.3d at 750.)

In re Newfound Lake Marina, Inc., No. 04-12192-MWV, 2007 WL 2712960, at *4 (Bankr. D.N.H. Sept. 14, 2007). The analysis of that case is probably tempered by the comments of Judge Yacos in one of the earliest cases:

> I do not believe however that bankruptcy judges have a warrant from Congress to run roughshod over the economic landscape recharacterizing commercial transactions entered into by sophisticated parties—restating them in terms of their "economic substance" contrary to their negotiated and agreed form—in the absence of some triggering factor permitting such recharacterization, i.e., an actual ambiguity in the documentation, a substantial factual dispute as to the intent of the parties, or some "disguise" or "misleading" aspect to the transaction

In re OMNE Partners II, 67 B.R. 793, 797 (Bankr. D.N.H. 1986). This Court has analyzed re- characterization using the tests articulated in *AtlanticRancher*:

> Accordingly, the Court shall focus on the factors employed by the courts in the [*In re*] *Micro–Precision[Technologies, Inc.*, 303 B.R. 238 (Bankr. D.N.H. 2003)] [*In re*] *AtlanticRancher [Inc.*, 279 B.R. 411, 433-34 (Bankr. D. Mass. 2002)] and *[In re]Hyperion[Enterprises, Inc.*, 158 B.R. 555 (Bankr. D.R.I. 1993)] decisions. Those factors are:
>
> 1. the adequacy of capital contributions;
> 2. the ratio of shareholder loans to capital;
> 3. the amount or degree of shareholder control;
> 4. the availability of similar loans from outside lenders;
> 5. certain relevant questions, such as:
>   a. whether the ultimate financial failure was caused by undercapitalization;
>   b. whether the note included payment provisions and a fixed maturity date;
>   c. whether the note or other debt document was executed;
>   d. whether advances were used to acquire capital assets; and
>   e. how the debt was treated in the business records.

In re Felt Mfg. Co., Inc., 371 B.R. 589, 630 (Bankr. D.N.H. 2007).

Loan advances made to save a foundering business receive special consideration: "The Court agrees with [the Debtor's principal] that troubled debtors must be able to borrow money from their principals because

when a business is in trouble, its borrowing options are limited." *In re Newfound Lake Marina, Inc.*, No. 04-12192-MWV, 2007 WL 2712960, at *8 (Bankr. D.N.H. Sept. 14, 2007).

With those principles in mind, the Examiner reviews the advances made and their character in reverse chronological order:

A. *Advances made from the Execution of the Forbearance Agreement to the Petition Date.* On July 16, 2015, S&S demanded payment in full of all amounts due under the Secured Note by reason of the failure of the Debtor to have made payments due thereunder. On July 17, 2015, the Debtor and S&S entered into a Forbearance Agreement. On August 17, 2015, the Debtor and S&S entered into an Amended and Restated Forbearance Agreement. The Amended and Restated Forbearance Agreement contemplated the sale of the business assets to the Lender by a bankruptcy sale, and a Lender's credit bid. *See, Amended and Restated Forbearance Agreement* August 17, 2015, §3.2. Exhibit 3. Between July 16, and the bankruptcy petition, S&S advanced $1,600,000 to keep the Debtor alive to an auction sale. Exhibit 4. The advances were evidenced by an allonge to an existing note. The advances were made pursuant to an existing revolving credit loan agreement. The advances were secured by a security agreement with the appropriate UCC-1 financing statement filed. The advances had a set rate of interest and a fixed maturity date. The financial failure to which the advances responded was not caused by undercapitalization but by the disr ption arising from the loss in the arbitra-

tion proceeding with Mission. The advances were treated on the books of the company as debt. The advances bore interest. The advances were not made at a time when outside lenders were asked to provide financing and so the availability of outside financing cannot be known but it appears as though outside financing would not have been available. Capital contributions to that date had been substantial although the net equity position was negative. Capital contributions amounted to $8,195,303 before reductions for losses. Capital contributions in 2015 and total shareholder loans made in 2015 were of the same order of magnitude (about $3,500,000) although the capital contributions to that point in time had been absorbed by the losses such that the net equity position was negative ($689,000) as of June 30, 2015. In light of the policy permitting or encouraging the Company principals to lend money to the business to attempt to save it, or at least maximize its value at auction, the Examiner's view is that the secured debt extended from July 17, through the date of the bankruptcy petition in the amount of $1,600,000 will survive the re-characterization challenge.

B. *Advances Made From the Date of the Arbitration Proceeding (March 3-5, 2015) to the Notice of Default (July 16, 2015).* During the period March 6, 2015 through July 15, 2015, the Debtor borrowed and S&S advanced six (6) times under the Secured Note in the aggregate amount of $1,700,000. For the reasons identified in Section A above, the Examiner believes that it is unlikely that the advances during that period

will be subject to re-characterization. Therefore, the Examiner believes that it is unlikely that a total of $3,300,000 of the secured debt will not be re-characterized.

C. *Advances Made From January 1, 2015 through March 3, 2015.* There was one advance on the Secured Note between January 1, 2015 and March 3, 2015 which was the $250,000 advance made on February 19, 2015. For the reasons identified in Section A above, the Examiner believes it unlikely that advance will be re- characterized. In addition, S&S did not become a member of the Debtor until March 25, 2015, and so the insider analysis is much different and more favorable to characterization as debt. Therefore, the Examiner believes that it is likely that a total of $3,550,000 plus interest will not be re-characterized as equity.

D. *The Advance of September 24, 2014.* On September 24, 2014, S&S advanced $1,000,000 on the secured line of credit to repay a previous unsecured debt owed to S&S. The Examiner believes that one cannot consider the advance of September 24, 2014 without examining whether it is subject to recovery as a preference. 11 U.S.C. §547. Because S&S is an affiliate of the Debtor owning indirectly more than 20% of the voting securities of the Debtor it is an insider subject to the one year recovery period of §547.[14] *See,* 11 U.S.C. §101 (2)(A)(Definition of

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[14] During the period 1/1/2103 through 12/31/2014 Frigid Fabrics owned 48% of the equity of the Debtor. The Examiner believes that S&S held 68% of Frigid Fabrics. The multiplication

affiliate); 11 U.S.C. § 101(31)(E) (an affiliate is an insider); 11 U.S.C. §547 (b)(4)(B) (One year look back period for insiders). Because the debtor was insolvent based on its balance sheet at the time (the Balance Sheet as of September 30, 2014 discloses a negative equity of ($1,023,142)) the transfer of security to secure the otherwise unsecured obligation may be a preference which a trustee may recover. 11 U.S.C. §101(54)("transfer" includes the creation of a security interest). If the transfer caused S&S to recover more than it would have otherwise recovered in a Chapter 7 case then it would be recoverable as a preference and S&S's entire claim would potentially be disallowed unless S&S were to disavow the transfer. 11 U.S.C. §502(d). Given the results of the auction, it seems unlikely that the advance of $1,000,000 under the secured note to pay down the unsecured note resulted in any additional recovery by S&S since the auction seemed to establish that the value of the Debtor's business was less than $3,000,000 and the advances made after September 24, 2014 exceed that amount. So, from the standpoint of the sale and the bid, the Examiner believes that the re- characterization of the September 24, 2014 advance probably does not matter, but if it did, then its characterization depends on the characterization of the unsecured debt claimed by S&S.

E. *The Advance of August 28, 2014.* Like the advance of September 24, 2014, the $1,000,000 ad-

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yields an indirect ownership of 32.64% as of the date of the transfer.

vanced on the secured not on August 28, 2014 was immediately repaid to S&S to partially satisfy the unsecured note. Like the advance of September 24, 2014, it probably reaches no value for credit bid purposes, but if it did, its characterization depends on the previous unsecured debt.

F. *The Unsecured Note*: The Examiner's view is that there is a good chance that the Unsecured Note will be subject to re-characterization as some form of equity. There should be two perspectives for examining the unsecured note: first, from the standpoint of the rights of S&S vis-a-vis other equity interests; and second, from the standpoint of the rights of S&S vis-a-vis creditors. The Examiner's view is that while the economic reality may be that the Unsecured Note entitles S&S to be paid on the Unsecured Note ahead of other equity it may simultaneously be that the economic realities and expectations of the parties were that S&S would be paid only after other creditors. Going through the various factors the analysis is as follows:

a. *Name given the instrument*: The parties called the instrument a note. The Examiner's counsel has inquired and been informed that the note existed before the first advance. The note was given by sophisticated parties with finely nuanced interests. This factor augurs in favor of characterization as debt.

b. *The presence of fixed maturity date*: The instrument has a fixed maturity date. This fac-

tor weighs in favor of characterization as debt. However, the fixed maturity date was extended and the debt was converted in large part to equity. Part-way through the term, when the obligation was not in default, the Debtor borrowed under the secured note and partially repaid the unsecured note. The business reason for the borrowing and repayment is unclear: on the one hand the terms of the secured lending are more onerous by virtue of the security. On the other hand, the interest rate on the secured advance was prime plus ½ or 3.75% while the interest rate on the unsecured note was 5%. A substantial payment was made when no payment was due, and it is possible that the Court may look at the conduct of the parties and conclude that they treated the maturity date as a mere formality.

c. *The presence or absence of a fixed rate of interest and schedule of payments.* While the note fixes interest it provides for no schedule of payments. The Examiner believes that augurs in favor of characterization as equity.

d. *The source of repayments.* The only source of repayments for the unsecured note would be the business profits. This factor augurs in favor of characterization as equity.

e. *The adequacy or inadequacy of capitalization.* The balance sheets during the summer of 2013 (when the note is dated) show equity in excess of $1,500,000. The note however was for $6,000,000. The note proceeds appear to have funded losses. If that was the pur-

pose of the note proceeds, then the capitalization appears to have been inadequate because the note appears to contemplate funding millions of dollars of additional losses beyond the ability of the existing equity valuation to sustain. This factor augurs in favor of characterization as equity.

f. *The identity of interest between the creditor and stockholder.* S&S is both a creditor and indirect owner and in that regard has a complete identity of interest. If the test compares the identity of interest between the creditor and all owners then S&S held only a minority equity position in the Debtor. This factor is ambivalent between equity and debt, but, given the minority position of S&S tends to favor debt.

g. *The Security for the advances.* There was no security for the advances. This factor augurs in favor of characterization as equity.

h. *The extent to which the advances were subordinated to outside creditors.* Until the conversion to equity in March 2015, there was no express subordination to outside creditors. However, except for the $2,000,000 paid by advances under the secured note, there was also no payment even though outside creditors were being paid. This factor does not weigh in the determination.

i. *The extent to which the advances were used to acquire capital assets.* The advances were not used to acquire capital assets. This factor augurs in favor of characterization as equity.

j. *The presence or absence of a sinking fund to provide payments.* There is no sinking fund. This factor augurs in favor of characterization as equity.

k. *Adequacy of capital contributions.* It appears (at least in hindsight) that the capital contributions were inadequate. It also appears based on the size of the unsecured note that the parties knew that the capital contributions were insufficient. This factor augurs in favor of characterization as equity.

l. *The ratio of Shareholder loans to capital.* Upon the full advance of the loans by S&S, its loans dwarfed the then existing equity capital. This factor augurs in favor of characterization as equity.

m. *The availability of similar loans from outside lenders.* The Debtor did have a loan with an outside lender but fully secured and with a substantially smaller limit. The Examiner believes that a similar unsecured loan would not have been available from an outside lender. This factor augurs in favor of characterization as equity.

n. *How the debt was recorded on the business records.* The loan appears to have been recorded as a loan on the Debtor's books and this factor would augur in favor of a determination that the unsecured note is debt. On the other hand, Mission asserts that various financial statements were shown to potential investors that did not show insider debt. If true that assertion would tend to establish that the debt was not recorded on the books

of the Debtor as debt but rather was treated as equity. The Examiner believes that this factor does not bear any material weight.

The Examiner concludes that the Unsecured Note is probably subject to re- characterization as equity.

The Examiner concludes that the likelihood is that the advances on the Secured Note in the year 2015 will survive challenge under a re-characterization theory. The advance before that date may not.

EQUITABLE SUBORDINATION

The Examiner does not believe that any of the advances in 2015 will be subject to a successful equitable subordination challenge. 11 U.S.C. § 510(c) allows a claim to be equitably subordinated in narrow circumstances. *In re Shepherds Hill Development*, LLC, 2000 BNH 21 at 7. Equitable subordination only arises where (1) the claimant has engaged in some type of inequitable conduct; (2) the misconduct resulted in injury to the creditors of the bankrupt or conferred an unfair advantage on the claimant; and (3) equitable subordination of the claim must not be inconsistent with the provisions of the bankruptcy code. *Id. citing Benjamin v. Diamond (In re Mobile Steel Co.)*, 563 F.2d 692, 699-700 (5th Cir. 1977); *See also Capitol Bank & Trust Co. v. 604 Columbus Ave. Realty Trust (In re 604 Columbus Ave. Realty Trust)*, 968 F.2d 1332, 1353 (1st. Cir. 1992) (adopting the *Mobile Steel* test).

a. Inequitable conduct.

The gateway question in any equitable subordination analysis is whether the claimant has engaged in inequitable conduct. Where the claimant is an insider of the debtor, the proponent of equitable subordination need only prove that the claimant breached a fiduciary

duty or engaged in conduct that is somehow unfair. *In re Colonial Poultry Farms*, 177 B.R. 291, 301 (Bankr.W.D.Mo. 1995). Undercapitalization may be evidence of inequitable conduct that provides a basis for equitable subordination of an insiders claim based upon loans made to the corporation. Id. at 302.

Capital in the context of the capitalization and equitable subordination refers "not to working capital, but to the amount of the stockholder's investment, the paid-in capital." *Colonial Poultry Farm*, 177 B.R. at 302. While undercapitalization is generally measured at the inception of the business, evidence of capitalization at a later time may still be evidence of inequitable conduct. *Id.* However, undercapitalization is not, on its own, sufficient to provide for equitable subordination. *Id.* Equitable subordination is warranted where undercapitalization is combined with other inequitable conduct. *Id.* (listing examples including fraud, spoliation, mismanagement or faithless stewardship). The mere making of a loan by an insider to a struggling business does not warrant equitable subordination *Id.* at 303.

Public policy weighs against equitable subordination in the absence of truly inequitable conduct. *See In re De Feo Fruit Co. Inc.*, 24 B.R. 220, 227 (Bankr. W.D.Mo. 1982)(subordination on undercapitalization basis alone would "discourage owners from trying to salvage a business"); *In re Reo Crescent Corp.* , 23 B.R. 958 (964 (Bankr. E.D.N.Y. 1982) (refusing to equitably subordinate a shareholder's claim based on loans made to the company because "[t][he penalty for attempting to save the corporation should not be subordination.")

The Examiner does not believe that the kind of undercapitalization which would constitute the inequitable conduct required for equitable subordination is pre-

sent here. The balance sheets for 2011 and 2012 each disclose in excess of $3,000,000 in net equity. Over the course of the Debtor's financial history the Members contributed more than $8,000,000 in equity. *See*, Exhibit 5. The debtor lost over $3,000,000 in 2013. That loss resulted in a slim equity position, but it did not (as far as the Examiner knows) arise from inequitable conduct nor impose on the members an affirmative obligation to put more capital at risk.

The only conduct that might be deemed inequitable is the conversion of $2,000,000 from an unsecured debt (or even equity) to a secured debt but the appropriate remedy would be to subordinate that $2,000,000 not all obligations of every kind owing from the Debtor to S&S. Because the subordination of that $2,000,000 changes none of the results of the auction the Examiner believes that there is no viable equitable subordination recovery.

b. Causal relation to harm.

The second prong of the equitable subordination analysis is that the inequitable conduct must have caused harm to the other creditors. Equitable subordination is remedial in nature and only appropriate where harm exists. *In re ALT Hotel, LLC*, 479 B.R. 781, 804 (Bankr. N.D. Ill. 2012) (equitable subordination is "remedial, not punitive, and is meant to minimize the effect the misconduct has on other creditors"). The misconduct must have caused the harm. *In re 201 Forest Street, LLC*, 409 B.R. 543, 572,573 (Bankr. D. Mass. 2009) (satisfaction of second prong of equitable subordination test requires identification of how inequitable conduct affected or was unfair to other creditor) *See also In re Terrific Seafoods, Inc.*, 197 B.R. 724, 735 (Bankr. D. Mass. 1996) (refusing to equitably subordi-

nate claims because there was no causation between the innocent critters losses and the offending creditor's misconduct). If the misconduct is alleged to have harmed the entire creditor class, harm is shown when general creditors will be less likely to collect their debts as a result of the misconduct. *In re Enevid, Inc. 345 B.R. 426, 455 (Bankr. D. Mass. 2006)* (citing *604 Columbus Ave. Realty Trust*, 968 F.2d at 1363).

A claim is therefore subordinated only to the extent necessary to undo the effect of the misconduct. *In re ALT Hotel*, 479 B.R. at 804. Where there is no harm, to creditors, equitable subordination will not be applied. *Id.* The bid provides for the full payment of Schedule F creditors. These creditors will not suffer harm so as to warrant a further equitable subordination of the S&S debt. As detailed above, the bid provides for a substantial pool of assets which would be available to satisfy (at least in part) any administrative claim to which Mission might become entitled. As a result, the Examiner believes that, even if inequitable conduct sufficient to warrant equitable subordination was found and, even if the entirety of the S&S claim was to be eligible for subordination, the only creditor which might be able to show the requisite harm so as to give rise to the imposition of equitable subordination as a remedy is Mission.

Mission's showing of harm caused by the inequitable conduct is weak at best. The "inequitable conduct" is the conversion of equity or unsecured debt to secured debt. It is difficult to see how the conversion of unsecured to secured has caused damage to Mission since the resulting secured debt is out of the money.

In sum, the Examiner believes that approximately $3,550,000 of the secured claim will survive challenge

and support the bid. Because it does support the bid (but even if it did not) the Examiner believes that approving the sale is in the best interests of the estate.

WHEREFORE, the Examiner respectfully requests this honorable Court:

A. Accept this Report as the Examiner's Final Report; and

B. Either: (1) declare the Examiner's service and duties in this case concluded and discharge the Examiner; or (2) provide the Examiner with such other or further direction as the Court may deem appropriate; and

C. Grant such other relief as may be just and equitable.

Respectfully Submitted,

Michael S. Askenaizer, Ch. 11 Examiner
By his counsel,
FORD & McPARTLIN, P.A.

Dated: November 24, 2015

By: *[s/ Edmond J. Ford](#)*
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CERTIFICATE OF SERVICE

I hereby certify that on November 24, 2015 a copy of the foregoing was forwarded electronically and/or via U.S. First Class Mail, postage prepaid, to the following parties:

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EXHIBIT 1

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE

Chapter 11
Case No. 15-11400-JMD

IN RE TEMPNOLOGY, LLC,
Debtor,

EXAMINER'S FIRST INTERIM REPORT

Michael S. Askenaizer, Examiner (the "Examiner") pursuant to this Court's order dated September 18, 2015 (Doc. No. 138) (the "Examiner Order") directing the United States Trustee to appoint an examiner, and this Court's order dated September 24, 2015 (Doc. No. 171) appointing the undersigned, submits his first interim report as follows:

Introduction

1. This bankruptcy case was commenced by the filing of a voluntary petition under Title 11, Chapter 11, United States Code on September 1, 2015 by Tempnology, LLC ("Debtor"). Concurrent with the filing of the bankruptcy petition, the Debtor filed schedules as well as a statement of financial affairs. In addition to the petition and schedules, the Debtor filed motions for typical first day orders, including a motion to permit

the Debtor to utilize its existing cash management system, authorizing and directing banks and financial institutions to honor and process checks and transfers and authorizing Debtor to use existing bank accounts and existing business forms (Doc. No. 7); authorizing payment of compensation and benefits of certain employees (Doc. No. 10); authorizing the Debtor to provide adequate assurance of payment to utility companies (Doc. No. 11); authorizing the payment of certain pre-petition shipping, warehousing and delivery charges (Doc. No. 12); authorizing the Debtor to honor returns and exchanges (Doc. No. 13); authorizing the Debtor to use cash collateral, and authorizing the Debtor to obtain post-petition financing (Doc. No. 14) (collectively the "First Day Motions").

2. By various orders dated September 3, 2015 (Doc. Nos. 45 and 46), and September 4, 2015 (Doc. Nos. 54, 55, 56 and 57), the First Day Motions were granted on an interim or final basis.

3. On September 2, 2015, the Debtor filed its motion for entry of an order (I)(A) approving procedures in connection with the sale of substantially all of the Debtor's assets, (B) approving stalking horse protections, (C) scheduling related auction and hearing to consider approval of sale, (D) approving procedures related to assumption and assignment of certain executory contracts and unexpired leases, and (E) approving form and manner of notice thereof, and (II)(A) authorizing sale of substantially all of Debtor's assets pursuant to successful bidder's asset purchase agreement, free and clear of liens, claims, encumbrances, and other interests, and (B) approving assumption and assignment of certain executory contracts and unexpired leases related thereto. (Doc. No. 34) (the "Sale Motion"). Objections to the Sale Motion were filed by both Mission

Product Holdings, Inc. ("Mission") (Doc. No. 99) and by the United States Trustee (Doc. No. 118). In addition, on September 14, 2015, the United States Trustee filed his motion for order converting the Debtor's case to Chapter 7, or, in the alternative, authorizing the appointment of a Chapter 11 Trustee or Examiner (Doc. No. 107) (the "Conversion Motion"). The Court granted the motion of the United States Trustee in part by entering the Examiner Order.

4. Under the terms of the Examiner Order, Examiner was directed to initially investigate and report on the following items:

a. the negotiation and execution of the proposed stalking horse agreement ("Agreement") between the Debtor and Schleicher & Stebbins Hotels, L.L.C. ("S&S Hotels");

b. the amount, validity and priority of S&S Hotels' claims and liens;

c. the value of the assets ("Assets") to be sold through the Agreement;

d. the identification of all existing liens or secured claims against the Assets;

e. Whether and to what extent the Debtor has engaged in adequate marketing efforts with regard to the Assets;

f. specific liabilities to be assumed through the Agreement; and

g. whether the Debtor's proposed bidding procedures and form notice of sale [Court Docket No. 34] should be amended, clarified or supplemented.

5. On September 2, 2015, Debtor submitted its application to employ Phoenix Capital Resources ("Phoenix") as its investment banker for purposes of assisting the Debtor in the sale of the Assets. (Doc. No. 29).[1]

6. Following his appointment, the undersigned as Examiner reviewed the following documents: all of the pleadings on file in this bankruptcy case; the Agreement; notes, security agreement, and UCC Financing Statements that pertain to S&S Hotels' claims and liens; an accounting from the Debtor of the loans between the Debtor and S&S Hotels for the period August 19, 2013 through August 31, 2015; documents and financial information assembled by Phoenix; a salary schedule for managers and other employees of the Debtor; certain banking records of the Debtor including payee information for the period September 1, 2013 through August 31, 2015; management committee authorizations related to the claims of S&S Hotels; the schedule of liabilities proposed to be assumed through the Agreement; a UCC search dated September 28, 2015 of the Debtor; and the records of the Rockingham County Registry of Deeds.

7. In addition, Examiner attended the meeting of creditors pursuant to 11 U.S.C. §341 on September 23, 2015; interviewed Richard Ferdinand ("Mr. Ferdinand"), chief financial officer of the Debtor; conducted a telephone interview on September 24, 2015 and September 25, 2015 of Michael Simchick ("Mr. Simchick"), former CEO of the Debtor and an investor in Frigid Fabrics, LLC, a member of the Debtor; conducted a telephone interview on September 24, 2015 of Josh

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[1] As of the date hereof, the Court has yet to act on the application.

Shaw, president of Mission; conducted a telephone interview on September 28, 2015 of Vince Colistra, ("Mr. Colistra"), Joe Nappi and Patrick Bellot of Phoenix; conducted a telephone interview on September 28, 2015 of Donna Flood, former COO of the Debtor; conducted telephone interviews on September 28, 2015 and September 29, 2015 of Kevin McCarthy("Mr. McCarthy"), the current CEO of the Debtor; conducted a telephone interview on September 29, 2015 of Ray Sozzi ("Mr. Sozzi") and Dennis Baldwin ("Mr. Baldwin"), the past and current chairmen of Mission; and interviewed Mark Stebbins ("Mr. Stebbins"), a member of S&S Hotels on September 29, 2015. In addition and at various times, Examiner held discussions with Christopher Desiderio, Esq., and Daniel Sklar, Esq., counsel for the Debtor; Christopher Candon, Esq., counsel for S&S Hotels; and Roma Desai, Esq., and Michael Siedband, Esq., counsel for Mission.

8. In addition, Examiner conducted limited legal research into the areas of insider preference; perfection and avoidance issues with respect to intellectual property; credit bidding by a secured creditor; and rejection issues related to intellectual property license agreements.

The Debtor

9. The Debtor was formed in 2011. Its business consists of the development and exploitation of various cooling fabrics and consumer products throughout the world. It utilizes the "Coolcore" and "Dr. Cool" brands. Its products are chemical free and were originally developed by Dennis Ackroyd, the Debtor's chief technology officer. The fabric consists of three layers which work at keeping body temperatures lower while in motion. According to Mr. Simchick, the fabrics were test-

ed by the Hohenstein Institute, a renowned international research and service center for the textile industry. According to Mr. Simchick, the Debtor's fabrics outperformed the fabrics of all other companies. Mr. Colistra further stated that his son-in-law, who is a runner, tested a sample of the Debtor's product and found it to be a superior cooling product. Mr. Simchick who is also a runner confirmed the usefulness of the Debtor's products to athletes.

10. According to Mr. Ferdinand, as of the date of the bankruptcy proceeding, the Debtor's ownership was as follows:

Frigid Fabrics, LLC ("Frigid") - 36.9%[2]

S&S Hotels - 30%[3]

Blue Wave, LLC - 2.5%[4]

CCT Corp. - 12.2%[5]

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[2] The members of Frigid are reported by Mr. Ferdinand to be S&S Hotels - 68% (The principals of S&S Hotels are Mr. Stebbins and Mark Schleicher); Mr. Ferdinand - 10.8%; Mr. Simchick - 12.5%; Bruce Armitage and CCY, LLC - approximately 3.3%; and Big Frigid, LLC - 1.7% (the members of Big Frigid are believed by Mr. Ferdinand to be Hank Stebbins, the brother of Mark Stebbins and two other individuals). Mr. Ferdinand could not account for the remaining 3.7% ownership.

[3] Acquired as the result of the conversion of unsecured debt of $3,500,000.00 for 48.86 newly issued membership units on March 25, 2015. The conversion appears to have been approved on the same date by the management committee of the Debtor, which consisted of Mr. Stebbins, Dennis Ackroyd, Christopher Burch, Robert Westergren and Mark Schleicher.

[4] According to Mr. Ferdinand, the principal of Mighty Moose, LLC is Chris Burch ("Mr. Burch").

Mighty Moose, LLC ("Mighty Moose")- 18.3%[6]

11. Based on data provided by the Debtor's Statement of Affairs, it appears that while sales have increased, the company is not profitable. The following sets forth the profit and loss data for fiscal years 2013, 2014, and 2015:[7]

	FY 2013	FY 2014	FY 2015 (Through 6/15)
Sales	$6,740,865	$9,140,843	$1,236,589
Net Loss	($3,422,768)	($1,839,378)	($2,315,086)

12. Following review of salary schedules, it appears that much of the losses are attributable to high selling, general and administrative expenses. Examiner is concerned that the salaries of management are not justified by the Debtor's performance.

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[5] According to Mr. Ferdinand, the principals of CCT Corp are Dennis Ackroyd and Rob Westergren. CCT Corp is also known as Cool Comfort Technologies, Inc. CCT developed many of the technologies used by the Debtor. CCT acquired its interest in the Debtor in exchange for its technology.

[6] According to Mr. Ferdinand, the principal of Mighty Moose, LLC is Chris Burch ("Mr. Burch").

[7] Although the specific revenues and losses 2011 and 2012 are not on the Debtor's Statement of Affairs, at the §341 meeting of creditors, Mr. Ferdinand, reported that the company earned a small profit of approximately $800,000.00 for 2011. However, Mr. Ferdinand also reported that during 2011, many of the members of the management team were only working part time and, the company had a significant back log of product, thus artificially lowering the actual expenses for the fiscal year. He did report, however, that revenue for 2011 was approximately $5,000,000.00. Based on the balance sheets of the Debtor attached hereto as Exhibit 6, it appears that the Debtor had a net loss of $1,812,781.00 for 2012.

13. On November 21, 2012, Mission and the Debtor entered into a Co-Marketing and Distribution Agreement (the "Distribution Agreement"), a copy of which is attached to Mission's (I) Objection to Debtor's (A) Rejection Motion, (B) Sale Motion and (C) DIP Financing Motion; and (II) Notice of Election Pursuant to 11 U.S.C. §365(1l) (B) (and Incorporated Memorandum of Law) (the "Objection") filed with this Court on September 11, 2015 (Doc. No. 99). According to the Distribution Agreement, Mission was given the exclusive right to sell certain of the Debtor's cooling products, as well as a royalty free and non-exclusive perpetual license to use, reproduce, modify and create derivative work based on the Debtor's intellectual property including trademarks and domain names. Mission exercised its right to terminate the Distribution Agreement without cause on June 30, 2014 which set in motion an approximate two year wind down period during which the Distribution Agreement would remain in effect. Following the termination by Mission, on July 22, 2014 the Debtor attempted to terminate the Agreement for cause alleging various violations by Mission. The parties then proceeded to arbitrate their disputes and on June 10, 2015, the arbitrator determinated that the Agreement remains in full force and effect with a termination date of July 1, 2016 and that Mission retains its non-exclusive, royalty free license in perpetuity. The second phase of the arbitration, to determine damages, has been stayed due to the filing of the bankruptcy petition.

14. Following the adverse decision in arbitration, on July 16, 2015, S&S Hotels, the only secured creditor of the Debtor, delivered its Notice of Default under its loan agreement with the Debtor and the bankruptcy petition was subsequently filed by the Debtor. A copy

of the Notice of Default is attached hereto as Exhibit 1. On September 2, 2015, the Debtor filed its Omnibus Motion to Reject Certain Executory Contracts, including the Distribution Agreement (Doc. No. 32) (the "Rejection Motion"). In response to the Rejection Motion, Mission has asserted in the Objection, among other things, that the Distribution Agreement is not a part of the bankruptcy estate as a result of Mission's termination without cause; the Distribution Agreement is not an executory contract within the meaning of 11 U.S.C. §365(a); and, pursuant to 11 U.S.C. §365(n), even if the Distribution Agreement is subject to rejection, Mission has elected to retain its rights in the Distribution Agreement as a licensee of the Debtor's intellectual property. The hearing on the Rejection Motion is currently scheduled for October 2, 2015 at 9:00 a.m.

15. Based on discussions with management of the Debtor and with representatives of Phoenix Capital, unless the Debtor can free itself from the Distribution Agreement, the value of the Assets will be severely impacted.

16. The current management of the Debtor consists of Mr. McCarthy, CEO; Mr. Ferdinand, CFO; Mark Matheny, VP Operations; Robert A. Westergren, Senior Director Fabric Costing/ Sourcing; Scott McQuade, VP Strategic Partnerships; Nicholas Skally, VP Brand Marketing & Communications; Allison Spahr, VP Innovation & Product Marketing; Debbie Delisle, VP North American Sales; and Vicente Satir, International Sales Manager. Mr. Stebbins, a principal of S&S Hotels currently has no formal role with the company, although he previously was an active member of the management committee. However, as revealed in the arbitrators decision, (Doc. No. 99), Mr. Stebbins actively participated in the activities of the Debtor.

According to Mr. Simchick, during his tenure with the company, Mr. Stebbins was actively involved in the decision making process and stated that no decisions could be made without Mr. Stebbins' approval. Mr. Stebbins confirmed that as to major decisions, management would first run the proposals by him for input before seeking approval of the management committee. He confirmed that he had the ability to veto projects, but claimed that he never exercised that authority. Mr. Sozzi and Mr. Baldwin asserted that in their various discussions and meetings with Mr. Stebbins, he held himself out as the controlling shareholder of the Debtor and the maker of all key decisions.[8]

The Negotiation and Execution of the Agreement

17. The Examiner is advised that on or about July 13, 2015 and prior to delivery of the Notice of default by S&S Hotels, a meeting was held at Nixon Peabody to discuss the Debtor's options, including a sale of the assets and a Chapter 11 bankruptcy filing. A forbearance agreement with S&S Hotels was negotiated, and au-

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[8] As examples of the degree of control exercised by Mr. Stebbins over the Debtor, Mr. Sozzi and Mr. Baldwin advised Examiner that in their negotiations concerning the Distribution Agreement, they were told by Justin Cupps, the former CEO of the Debtor, that any deal with Mission would require the approval of Mr. Stebbins. Mr. Sozzi further reported that throughout the nearly 3 year relationship between the Debtor and Mission, Mr. Stebbins was frequently in communication with him. Mr. Sozzi also reported that while Mr. Stebbins allowed the management team of the Debtor to handle the day-to-day execution of the business, he was actively involved in every aspect of operations and consistently made it clear that all material decisions, such as renegotiating the Distribution Agreement would have to be done with him and that the President of the Debtor was not empowered to make those types of decisions.

thorized by the Debtor's management committee on July 23, 2015 (Exhibit 2).

18. With respect to the negotiations, during his interview, Mr. McCarthy told the Examiner that as he had no prior experience, he left the negotiation of the Agreement to Debtor's counsel Nixon Peabody. He had no specific terms that he insisted be a part of the Agreement and only asked following the completion of the negotiations whether the Agreement was fair. Although Mr. McCarthy said that no promises of future ownership or employment were made to him, Mr. Ferdinand did confirm that management of the Debtor would be retained if the Agreement were approved by the Court and consummated. Mr. Ferdinand further reported that while there were no promises of future ownership in the business by S&S Hotels, he hoped that there would be. Mr. Stebbins also indicated that he left the negotiation of the Agreement to his counsel, Attorney Candon. He did however, emphasize his belief that current management is effectively running the Debtor's business and that he wanted to insure that the employees and management team of the Debtor remained employed, with the hope that some day the Debtor's business would improve and generate a return for S&S Hotels.

19. Since the Agreement contemplated that S&S Hotels would be the stalking horse, on July 20, 2015, the Debtor engaged Phoenix to assist in the marketing process. Phoenix initially identified and approached 15 different companies and solicited interest in acquiring the Debtor and serving as the stalking horse. A copy of the list of firms contacted by Phoenix is attached hereto as Exhibit 3. As indicated, 9 companies did not respond while 6 decided to pass on the opportunity. Examiner is not clear why Phoenix has not continued to contact

potential bidders rather than await the outcome of the hearings of October 2, 2015.

20. Phoenix has identified two problems with selling the Assets: the financial profile of the Debtor, given its short history and lack of profit; and, the uncertainty surrounding the Mission arbitration and Distribution Agreement. At the §341 meeting of creditors, Mr. Ferdinand testified that the Debtor did not obtain a valuation for the company nor was Phoenix retained for that purpose. Mr. Colistra in turn told the Examiner that a valuation would be difficult at this time and probably not useful. While the Debtor's products hold great promise, the potential is significantly impacted by the Distribution Agreement. At the §341 meeting of creditors, it was also asserted by the Debtor that the market will determine the value of the Assets. In order to assure that the market will in fact determine value, it is critical that all potential bidders be given complete access to all necessary documents and financial information of the Debtor in order to ensure that the process is fair, transparent and calculated to yield the best result possible for creditors and for the estate. Debtor's counsel and Phoenix have assured Examiner that they will do so, and have also provided assurances that if Mission wishes to bid on the Assets, it too will be provided access to the data and will have the opportunity to participate in the bidding process. It is also critical that Phoenix and the Debtor present a model to the investing community that will lead to profitability. It is unclear whether Phoenix or the Debtor have done so.

21. Under the terms of the Agreement, it is contemplated that S&S Hotels will acquire the Debtor for a total purchase price of $6,950,000.00, consisting of a credit bid of $6,850,000.00, $5.5 million of which repre-

sents its pre-petition secured claim, and the balance from its post-petition debtor- in-possession financing agreement), together with approximately $100,000.00 in assumed liabilities. Liabilities to be assumed will consist of those claims which arose 60 days prior to the closing date. Debtor estimated at the meeting of creditors that taking into consideration those creditors whose claims have been paid as the result of first day orders, approximately 80% of the claims listed on Schedule F of the Debtors schedules will not be paid through the sale together with any claims for damages resulting from the rejection of executory contracts and unexpired leases. In addition, the unliquidated claims of Mission, Justin Cupps, the former chief executive officer of the Debtor, and, Ryan Drew, a former vice president of marketing of the Debtor will also receive no payment as a result of the sale. Any recovery for these creditors will likely come from Chapter 5 recoveries which are excluded from the sale. The Debtor represented at the meeting of creditors, that it will have sufficient funds following the closing to pay all administrative expenses as a result of the debtor-in-possession financing provided by S&S Hotels.

The Amount, Validity and Priority of S&S Hotels as Claims and Liens

22. Throughout life of the Debtor, S&S Hotels and its principals have worn a number of hats. Mr. Stebbins, and Mark Schleicher have at various times served on the management committee of the Debtor, and, S&S Hotels has provided financing to the Debtor, both unsecured and secured. S&S Hotels also holds a substantial equity position indirectly through its ownership interest in Frigid Fabrics, LLC, and, through its direct ownership as the result of its conver-

sion of unsecured debt of $3,500,000.00 to equity in March of 2015.

23. According to the testimony at the meeting of creditors, S&S Hotels provided various funds in the form of loans that were periodically repaid by the Debtor. The Debtor ultimately executed an Unsecured Commercial Term Note in the amount of $6,000,000.00 payable to S&S Hotels (the "Unsecured Note") under date of August 15, 2013[9]. A copy of the Unsecured Note is annexed to Schleicher & Stebbins Hotels L.L.C.'s Limited Response to U.S. Trustee's and Mission Product Holdings, Inc's Objections to Debtor's Sale and DIP Financing Motions ("Limited Response") filed with this Court on September 17, 2015 (Doc. No. 125). As indicated, the Unsecured Note bears interest at the rate of 5% per annum and was due and payable in full on January 15, 2015. While the Unsecured Note did not call for periodic payments, the Debtor could repay any amount at any time prior to the due date without penalty. The terms were extremely favorable to the Debtor, and far better than the Debtor could have expected to obtain in the commercial and financial marketplace. In fact, given the losses incurred by the Debtor, Mr. Ferdinand at the §341 meeting stated that he did not think that the Debtor was "bankable." In accordance with the terms of the Unsecured Note, S&S Hotels made various advances to the Debtor during the period August 19, 2013 through August 5, 2014. Mr. Stebbins reported that he was very involved in the pro-

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[9] Although the note was executed by Mr. Ferdinand on behalf of the Debtor, Mr. McCarthy during his interview expressed his concern that once he was elevated to CEO in November of 2013, loans had been made informally by S&S Hotels to the Debtor without documentation. He had no recollection of the Note, so it is unclear when the Unsecured Note was actually executed.

cess of loan advances provided by S&S Hotels and regularly met with Mr. Ferdinand to discuss the Debtor's cash needs. The total balance under the Unsecured Note as of August 5, 2014 was $5,374,308.00 including accumulated interest of $150,597.00. At no time prior to August 5, 2014 did the Debtor make any payments on account of the obligation. According to Mr. McCarthy, Mr. Stebbins put no pressure on the Debtor to make payments on account of the Unsecured Note. According to Mr. Stebbins, he did not ask for payments because he knew the Debtor was unable to do so without further advances from S&S Hotels. An accounting of the advances and payments produced by the Debtor is annexed hereto as Exhibit 4.

24. On June 4, 2013, the Debtor entered into a Loan and Security Agreement (the "Secured Loan") with Peoples United Bank ("Peoples") consisting of a revolving loan with an aggregate borrowing limit of $350,000.00. The Secured Loan bears interest at the very favorable rate of prime plus .5%. In exchange for the Secured Loan, the Debtor granted to Peoples a security interest in virtually all of its tangible and intangible assets, including its intellectual property. The security interest was perfected by the filing of a UCC-1 Financing Statement[10] with the New Hampshire Secretary of State on June 6, 2013. The maturity date of the

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[10] Counsel for S&S Hotels has represented that no filings were made with the United States Patent Office. The undersigned assumes that In re Pasteurized Eggs Corporation, 296 B.R. 283 (Bankr. D.N.H. 2003) remains controlling and that no filing with the Patent Office was required for Peoples and S&S Hotels to perfect the security interest in the Debtor's patents. Examiner at the present time does not see a basis for challenging the perfection of the security interest.

Secured Loan was initially June 4, 21014.[11] Copies of the Loan and Security Agreement, Revolving Line of Credit Note, and UCC-1 Financing Statement are annexed to the Limited Response.

25 According to Mr. Ferdinand, as of July 31, 2014, the balance due under Secured Loan was zero, and, S&S Hotels purchased the Note and Security Agreement from Peoples. Copies of the Purchase Agreement, Assignment and UCC-3 reflecting the purchase by S&S Hotels are annexed to the Limited Response. According to Mr. Stebbins, the purchase coincided with the termination of the Distribution Agreement. He further stated that he acquired the Secured Loan as a vehicle to make further advances to the Debtor, as he was unwilling to do so without some protection, given the activities of Mission.

26. A series of four allonges to the Secured Loan were executed by the Debtor and S&S Hotels between July 31, 2014 and August 17, 2015 which ultimately increased the available credit line to $5.5 million and extended the maturity date of the Secured Loan to December 31, 2015. S&S Hotels thereafter made a series of advances under the Secured Note beginning August 28, 2014, and concluding August 24, 2015 in the total amount of $5.5 million. An accounting of the advances under the Secured Loan provided by the Debtor is annexed hereto as Exhibit 5. As indicated by the accountings, the first two advances made by S&S Hotels to the Debtor under the Secured Loan totaled $2 million. Concurrent with the advances, the funds were repaid by the Debtor to S&S Hotels in order to reduce the obligation owed under the Unsecured Note. The

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[11] On June 3, 2014, Peoples extended the maturity date to August 3, 2014.

first payment was made on August 28, 2014 in the amount of $1 million, and the second payment was made on September 23, 2014, also in the amount of $1 million. The second payment occurred during the one year insider preference period provided by 11 U.S.C. §547(b)(4)(B). Thus, the effect of the initial advances under the Secured Loan was to convert $2 million of S&S Hotels' unsecured debt to secured debt; $1 million of which occurred during the one year insider preference period.[12]

27. Mr. McCarthy advised the Examiner that he did not directly participate in the decision to make the payments to S&S Hotels, and it is not clear who did. The Examiner further notes that despite the requirements of the Secured Note, the Debtor made no interest payments on the Secured Loan and S&S Hotels did not declare a default under the Secured Loan until July 16, 2015.

28. On March 25, 2015, S&S Hotels agreed with the Debtor that it would convert $3.5 million of its unsecured obligation, to 48.86 newly issued membership units in the Debtor. The effect of the conversion was to dilute the ownership interest of the remaining members. A copy of the Conversion Agreement is annexed to the Limited Response. While approval of the management committee was given for the conversion, Mr. Simchick, complained that he did not receive any prior notice, nor an opportunity to purchase additional membership units to preserve his ownership interest in the Debtor. It appears that following the conversion, S&S

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[12] Examiner has recommended that the Debtor amend its response to Question 3.C of the Statement of Financial Affairs to reflect the payment.

Hotels was still owed, according to the accounting, $149,069.00 on account of the Unsecured Note.[13]

29. The Debtor has supplied Examiner with unaudited quarterly balance sheets for the period commencing December 31, 2011, and ending of June 30, 2015. Copies are annexed hereto as Exhibit 6. A summary of the changes in members equity and debt structure with respect to S&S Hotels as an unsecured creditor and secured creditor succeeding Peoples follows:

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[13] At the meeting of creditors, the Debtor's counsel indicated that Schedule F of the Debtor's Schedules would be amended to reflect the balance due.

Date:	Members Equity	S&S Hotels Unsecured	Peoples Line of Credit	S&S Hotels Secured
12/31/11	3,449,376			
3/31/12	4,061,327			
6/30/12	4,078,605			
9/30/12	3,934,599			
12/31/12	3,586,595			
3/31/13	3,855,722			
6/30/13	3,106,684			
9/30/13	1,787,423	875,000	341,894	
12/31/13	168,827	2,194,000	296,556	
3/31/14	(557,041)	4,620,000	334,447	
6/30/14	30,293	4,970,000	212,124	
9/30/14	(1,023,142)	4,542,073		1,000,000
12/31/14	(1,839,378)	3,542,073		2,000,000
3/31/15	776,074	776,074		3,250,000
6/30/15	(689,980)	42,073		3,950,000

30. The foregoing reveals a steady deterioration of members equity due to ongoing losses. On a balance sheet basis, it appears that the Debtor became insolvent during the first quarter of 2014. Mr. McCarthy confirmed that based on his understanding of insolvency, the Debtor was insolvent by no later than the 1st quarter of 2015. However, by the time S&S Hotels began converting its unsecured debt to secured debt, the equity deficiency was in excess of $1 million.

31. Mission has raised in its Objection *inter alia* that the secured debt of S&S Hotels should be recharacterized as equity, or, subordinated. Examiner believes the level of control asserted by Mr. Stebbins over the affairs of the Debtor; the modest interest rate charged by S&S Hotels under both the Unsecured Note and the Secured Loan; the Debtor's lack of profitability and inability to service the obligations absent advances by S&S Hotels; the lack of any payments or claims for payment under the Unsecured Note or the Secured Loan, other than the two $1 million payments, which in effect converted a portion of the unsecured obligation to secured; and the failure of S&S Hotels to call a default under any of the obligations until July 16, 2015, following the adverse ruling in arbitration are all factors which lend support to Mission's position. Mission further reported that as recently as one year ago, representatives were shown a balance sheet for the Debtor which listed minimal trade debt and essentially no long term debt obligations. Mr. Sozzi further reported that in the fall of 2014 during a telephone call with Mr. Stebbins, he was assured by Mr. Stebbins that the Debtor had no debt beyond ordinary trade payables, and that while Mr. Stebbins had contributed some money to the business, it was as equity and not debt. Mr. Stebbins' position on the other hand that S&S Ho-

tels did not insist on payment due to the Debtor's inability to pay, absent further advances from S&S Hotels tends to counter the position of Mission. Given the subsequent conversion of a significant portion of the unsecured obligation to equity, it may be that Mr. Stebbins never viewed the Unsecured Note as anything more than equity.

The Value of the Assets to be Sold Through the Agreement

32. Inspection of the Debtor's schedules reveal that the Debtor has few if any tangible assets. The real value of this company exists in its intellectual property, as encumbered by the Distribution Agreement. On Schedule B.22, the Debtor valued its intellectual property at $659,000.00. At the meeting of creditors however, Mr. Ferdinand testified that that value consisted solely of the amounts invested by the Debtor in attorneys, consultants and other professionals in support of the acquisition and registration of its patents and trademarks. Neither the Debtor or Phoenix have made any attempt to value the intellectual property. In addition, neither the Debtor or Phoenix have provided any discounted projected cash flow that would help in determining a value for the Assets.

33. In addition, the Debtor lists on Schedule B.3. "Various customer prepayments or deposits" in the amount of $108,819.00. In response to questioning by the United States Trustee, Mr. Ferdinand indicated these amounts represent prepayments by customers rather than actual deposits that were held in a segregated account by the Debtor. In addition, the value for finished goods disclosed at Schedule B.30 represents

the book value of such goods, which may not in fact be the equivalent fair market value of such goods.[14]

The Identification of All Existing Liens or Secured Claims Against the Assets

34. Examiner has obtained and reviewed a UCC search for the Debtor conducted on September 28, 2015, and searched the records of the Rockingham County Registry of Deeds. Other than the secured debt owed to S&S Hotels identified on Schedule D of the Debtor's schedules and discussed above, there do not appear to be any other secured liens or claims against the Assets.

Other and to what Extent the Debtor has Engaged in Adequate Marketing Assets with Regard to the Assets

35. In its discussions with representatives of Mission, Examiner was advised that at one time, Mission had submitted a proposal to purchase the Debtor for a total price of $10 million, consisting of cash of approximately $2 million to $3 million, with the balance to be paid as an earn out over time. The offer was confirmed by Mr. Stebbins who indicated that he was seeking $15 million instead. According to the Debtor and Mission, no further negotiations proceeded. The negotiations indicate that at one time, the Debtor had, at least in the eyes of the parties, significant value, far in excess of the price reflected by the Agreement. At the time of the

[14] Mr. Simchick also advised Examiner that while Mighty Moose invested $2 million to $2.5 million in the Debtor in exchange for its ownership interest. Mr. Burch and Mighty Moose had committed to invest an additional $1.5 million but never contributed the funds. Examiner has not received verification whether Mr. Simchick's claim is accurate and if so, whether the commitment is enforceable. The obligation to invest could be a significant additional asset.

arbitration, Mission apparently submitted a significantly lower offer, that was rejected by the Debtor. Mission did however indicate, in its discussions with Examiner that, but for the fact that S&S Hotels was seeking to credit bid its secured debt to purchase the Assets, it would have an interest in submitting a bid. Mission, however, opined that the Assets were worth far less than the purchase price under the Agreement. In addition, Mr. Simchick told Examiner that customers such as Addidas or Nike would be excellent parties to acquire the Assets. Examiner is advised that Phoenix has prepared a list of 150 potential bidders who will be contacted following this Court's approval of the bidding process. Addidas and Nike are both on the list. In addition to reviewing the proposed list of interested buyers, Examiner has inspected the documents contained in the so called "data vault" maintained by Phoenix which appear to be comprehensive and adequate for purposes of encouraging prospective bidders to begin a review of the Debtor and the Assets. Examiner believes that Phoenix, if it has not already done so, should be actively contacting additional potential bidders.

Specific Liabilities to be Assumed
Through the Agreement

36. Examiner has requested from counsel for S&S Hotels a listing of the liabilities to be assumed. That list is annexed hereto as Exhibit 7, but is subject to review and revision by S&S Hotels.

Whether the Debtor's Proposed Bidding Procedures
and Form Notice of Sale Should be Amended,
Clarified or Supplemented

37. With respect to the bidding procedures, the minimum overbid of $250,000.00 and breakup fee of actual out of pocket expenses incurred by S&S Hotels ap-

pear reasonable under the circumstances. Examiner is advised that the estimated current expenses incurred by S&S Hotels' counsel are approximately $45,000.00. Examiner, however, cannot recommend that S&S Hotels be permitted to credit bid its entire pre-petition secured indebtedness against the purchase price. At a minimum, the credit bid must be reduced by $2 million to reflect the conversion of unsecured debt owed to S&S Hotels by the Debtor to secured debt, without any new value flowing to the Debtor. Given that $1 million occurred during the one year preference period further compels a limitation of the credit bid. With respect to the balance of the credit bid, given the factors discussed above, including the level of control exerted by Mr. Stebbins, the lack of any payment on account of the Secured Loan, the modest interest rate charged, and the failure to S&S Hotels to call a default until after the arbitration are all factors that the Court should consider. Alternatively, S&S Hotels' explanation of the Debtor's inability to answer any demand for payment and its acquisition of the Secured Loan from Peoples to provide protection are also compelling factors. Examiner, however, does not see a basis for limiting S&S Hotels' ability to credit bid post-petition loans it has and will make to the Debtor.

38. Examiner is concerned that if the Court immediately eliminates all credit bidding or significantly delays the sales process, S&S Hotels will withdraw and cease funding under its post- petition loan with the Debtor. The Debtor will quickly fail, resulting in conversion to Chapter 7. Therefore, unless another party, such as Mission, is willing to immediately provide post-petition financing to the Debtor on the same or better terms offered by S&S Hotels, the Court should not delay the sale process for a lengthy period of time to de-

velop the merits of the Objection. Examiner therefore recommends that the Court expedite an evidentiary hearing on the Objection with the opportunity for limited discovery by all parties, before ruling on the Objection. In the meantime, Phoenix should be directed to forthwith contact potential purchasers of the Assets.

Respectfully submitted,

Dated: September 30, 2015

/s/ Michael S. Askenaizer
Michael S. Askenaizer
(BNH #04714)
29 Factory Street
Nashua, New Hampshire 03060
Telephone: (603) 594-0300
Examiner

CERTIFICATE OF SERVICE

I, Michael S. Askenaizer of 29 Factory Street, Nashua, New Hampshire 03060 certify:

That I am, and at all times hereinafter was, more than 18 years of age;

That on the 30th day of September, 2015, I served a copy of the foregoing EXAMINER'S FIRST INTERIM REPORT and any and all other related documents filed in this proceeding via CM/ECF electronic notification on:

Office Of the U.S. Trustee
1000 Elm Street, Suite 605
Manchester, NH 03101

All parties listed on the Courts' CM/ECF register

In addition to the parties served electronically, the following were served via U.S. Postal Service:

None

I certify under penalty of perjury that the foregoing is true and correct.

Dated: September 30, 2015

/s/ Michael S. Askenaizer
Michael S. Askenaizer

MEMORANDUM OPINION ON ORDER AUTHORIZING SALE, BANKR. DKT. 306, FILED DECEMBER 18, 2015

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE

Bk. No. 15-11400-JMD
Chapter 11

IN RE TEMPNOLOGY, LLC,
Debtor,

MEMORANDUM OPINION

I. INTRODUCTION

Pursuant to the Court's order dated October 8, 2015, approving procedures in connection with the sale of substantially all of the assets of Tempnology, LLC (the "Debtor"), the Debtor conducted an auction on November 5, 2015 (the "Auction"), at which Schleicher & Stebbins Hotels, L.L.C. ("S&S"), the stalking horse bidder, was declared the successful bidder. The Debtor now seeks an order: (i) authorizing the sale free and clear of liens, claims, encumbrances, and other interests, except as provided by the asset and purchase agreement; (ii) approving the assumption and assignment of certain of the Debtor's executory contracts and unexpired leases related thereto; and (iii) other related relief. Mission Product Holdings, Inc. ("Mission") objects to the conduct of the auction and sale for various reasons and challenges S&S's right to credit bid any

prepetition debt (the "Objections").[1] The Court conducted an evidentiary hearing concerning the proposed sale on November 18, 2015 and November 23, 2015, at which Vincent Colistra ("Colistra") of Phoenix Capital Resources ("Phoenix"), the Debtor's investment banker, Kevin McCarthy ("McCarthy"), the Debtor's CEO, Richard Ferdinand ("Ferdinand"), the Debtor's CFO, and Mark Stebbins ("Stebbins"), one of the principals of S&S, testified. Eighteen exhibits were admitted into evidence. For the reasons set forth below, the Court will overrule Mission's Objections and approve the sale.

II. JURISDICTION

This Court has authority to exercise jurisdiction over the subject matter and the parties pursuant to 28 U.S.C. §§ 157(a), 1334, and U.S. District Court for the District of New Hampshire Local Rule 77.4(a). This is a core proceeding under 28 U.S.C. § 157(b).

III. FACTS

By way of background, the Debtor is a Portsmouth, New Hampshire based material innovation company that, among other things, develops chemical-free cooling fabrics under the Coolcore brand for use in consumer products. S&S wears many hats in this case as the Debtor's majority equity owner, largest secured creditor, postpetition debtor in possession financier; stalking horse bidder; and purported successful purchaser. Mission was the counterparty to a Co-Marketing and Distribution Agreement (the "Mission Agreement") that the Debtor has since rejected pursuant to 11 U.S.C. § 365 and was the only other qualified bidder at the Auction.

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[1] Doc. Nos. 241, 244, 246.

A. *Prepetition Events*

The Debtor was formed in 2011. On November 21, 2012, the Debtor entered into a the Mission Agreement with Mission whereby the Debtor granted Mission the exclusive distribution rights to certain of the Debtor's products within the United States and a non-exclusive, irrevocable, royalty-free, perpetual, worldwide, fully-transferrable license to, *inter alia*, freely exploit the Debtor's intellectual property. Despite sales, the Debtor has remained unprofitable and has been plagued with losses.

In order to combat its liquidity problems, the Debtor sought financing. In the spring of 2013, the Debtor obtained a secured line of credit through People's United Bank (the "People's LOC") with a credit limit of approximately $350,000. During the same period, S&S loaned millions of dollars to the Debtor on an unsecured basis. Eventually, the balance of the S&S loan grew to a point where Stebbins and his partner, Mark Schleicher ("Schleicher"), agreed that further lending could only be done on a secured basis.

In the spring of 2014, the People's LOC provided S&S with a vehicle through which it could continuing advancing funds to the Debtor when People's United Bank called the loan. S&S then acquired the People's LOC and increased the loan limit for the secured loan from $350,000 to $4,000,000, and later to potentially $6,000,000. Following the acquisition of the People's LOC, S&S converted then-existing antecedent unsecured debt in the "multiple millions of dollars" to secured debt. By the spring of 2014, when S&S loaned the Debtor millions of dollars on a secured basis, no conventional lender would have done so based on the Debtor's history of losses dating back to 2012.

The Debtor's relationship with Mission also deteriorated in 2014, with both parties asserting material breaches of the Mission Agreement. After both parties attempted to terminate the Mission Agreement, the matter was submitted for arbitration. On June 5, 2015, the arbitrator issued a Partial Final Award, determining that the Debtor's termination for cause was ineffective and the Mission Agreement remained in full force and effect. The remainder of the arbitration has been stayed by the Debtor's bankruptcy.

In March, 2015, the Debtor's management committee accepted a proposal by S&S to convert a portion of S&S's unsecured debt to equity. Stebbins testified that this was done primarily to "right size" the Debtor's balance sheet to reflect a positive net worth. Although Stebbins and Schleicher were members of the management committee at this time, Stebbins testified that he abstained from the vote on this proposal. The record does not reflect whether Schleicher voted or abstained. In any event, as a result of the equity conversion and S&S's prior indirect interests in the Debtor through a company known as Frigid Fabrics, S&S gained a majority ownership interest in the Debtor.

Stebbins testified that his only role in the Debtor was as a member of the management committee. Although both McCarthy and Ferdinand sought advice from Stebbins regarding the Debtor's operations, he was not involved in the day to day operations of the Debtor, devoting only about an hour a week to the Debtor. Stebbins attended quarterly management committee meetings, and typically met with McCarthy and Ferdinand once or twice a month.

According to Stebbins, by July, 2015, it became obvious that a "workout" would be necessary when the

Debtor's financial situation did not improve. On July 13, 2015, the Debtor's management committee met with Stebbins to discuss the Debtor's financial status and discussed the terms of a forbearance agreement for S&S's secured loans. On July 15, 2015, Stebbins and Schleicher each resigned from the Debtor's management committee and were replaced by McCarthy and Ferdinand. Following the resignations, neither McCarthy nor Ferdinand had any further discussions with Stebbins regarding the Debtor's operations and both the Debtor and S&S obtained independent counsel. On July 16, 2015, S&S issued the Debtor a notice of default regarding the secured loan on account of the Debtor's failure to make interest payments.

On or about July 20, 2015, the Debtor engaged Phoenix as its investment banker to assess the Debtor's options, with Colistra serving as the lead investment banker. Neither S&S nor Stebbins had any involvement in the selection and engagement of Phoenix.

At a meeting in August, 2015, S&S and the Debtor agreed on the terms of a forbearance agreement. McCarthy and Ferdinand accepted the basic terms of a proposal made by S&S, which may have been made at the meeting on July 13, 2015, but the details were negotiated by the parties' respective counsel in August, 2015. The forbearance agreement provided for an additional $1,400,000 in secured financing through September 1, 2015, on the condition that the Debtor file for bankruptcy and seek to sell substantially all its assets pursuant to 11 U.S.C. § 363.

Based on a review of the Debtor's liquidity and its ability to raise debt, as well the existence of a forbearance agreement regarding substantial debt that would have to be paid off, Colistra determined that a sale was

necessary. Phoenix, without direction from the Debtor, contacted S&S to commence stalking horse negotiations after five other parties declined to do. Neither McCarthy nor Ferdinand was involved in the stocking horse negotiations with S&S and relied on counsel from Nixon Peabody to negotiate the agreement on the Debtor's behalf. Stebbins discussed possible terms of a stalking horse agreement with his counsel, Attorney Christopher Candon, but Attorney Candon primarily negotiated the terms on his behalf.

The original stalking horse agreement dated September 1, 2015 provided for a bid with an assigned value of approximately $7,000,000, the vast majority of which consisted of a credit bid of S&S's prepetition secured loan. The stalking horse agreement also contained a condition that both McCarthy and Ferdinand accept offers of employment from S&S (the "Employment Condition"). Ferdinand testified that the original stalking horse agreement embodied terms that were initially discussed at the meeting held on July 13, 2015. Notwithstanding the likelihood that some terms may have been first raised at the July 13, 2015 meeting, all witnesses testified that it was Phoenix that approached S&S regarding the possibility of it serving as a stalking horse, and that the negotiations were completed by counsel.

Admittedly, the parties expected that the purchaser would be S&S, but understood that the sale would ultimately be to the highest bidder and subject to bankruptcy court approval. Stebbins wanted the proposed sale to take place as quickly as possible, but deferred to Phoenix regarding how much marketing was needed. He also testified that S&S pursued this transaction because he and Schleicher always believed in the company and its product, but that a reorganization of the pri-

or management's acts—namely, the Mission Agreement—was necessary for S&S to be involved.

B. *The Bankruptcy Filing*

On September 1, 2015 (the "Petition Date"), the Debtor filed a voluntary Chapter 11 petition. On Schedule D — Creditors Holding Secured Claims, the Debtor listed S&S as holding a secured claim in the amount of $5,550,000 for advances made between August 28, 2014 and August 24, 2015.[2] S&S did not need to file and, to date, has not filed a proof of claim and Mission has not otherwise sought to directly object to S&S's claim.

The following day, on September 2, 2015, the Debtor filed a motion seeking, *inter alia*, approval of procedures in connection with a sale of substantially all of the Debtor's assets[3] (the "Sale Procedures Motion") and an Omnibus Motion to Reject Executory Contracts Nunc Pro Tunc to the Petition Date[4] (the "Rejection Motion"), including the Mission Agreement. Mission objected to the Sale Procedures Motion and the Rejection Motion, specifically electing to retain all permissible contractual and property rights under the contract the Debtor sought to reject pursuant to 11 U.S.C. § 365(n), which it contends includes the exclusive distribution rights in the Debtor's intellectual property.

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[2] Section 1111(a) and Fed. R. Bankr. P. 3003 (b)(1) provide that schedules filed by the Debtor in a Chapter 11 proceeding that do not list a liability as disputed, contingent, or unliquidated constitute prima facie evidence of a claim and a creditor need not file a proof of claim.

[3] Doc. No. 34.

[4] Doc. No. 35.

On September 9, 2015, S&S advanced $250,000 to the Debtor under a Court-approved debtor in possession financing facility (the "DIP Facility"). The wire transfer of the $250,000 advance was initiated by Pro Con, Inc. ("Pro Con"), an entity of which Stebbins is the chairman and CEO, but was drawn on S&S's checking account. Stebbins did not know why Pro Con was listed as the initiator, but testified that because S&S has no employees, he directed Pro Con's Vice President of Finance to effectuate the transfer.

On September 18, 2015, upon the motions of Mission and the United States Trustee, the Court appointed Michael Askenaizer as examiner (the "Examiner") to oversee the proposed sale process. The Examiner filed an interim report on September 30, 2015. On October 2, 2015, the Court entered an order granting the Rejection Motion, permitting the Debtor reject its contract with Mission subject to Mission's election to preserve its rights under 11 U.S.C. § 365(n).

On October 8, 2015, following a continued, contested hearing, the Court granted the Sale Procedures Motion. At this hearing, S&S agreed to lower its stalking horse bid to $1,050,000, consisting of a credit bid of $750,000 in financing extended to the Debtor postpetition (the "DIP Financing") and the assumption of approximately $300,000 in liabilities, consisting of approximately $130,000 in prepetition accounts payable incurred within 60 days of the Petition Date and approximately $150,000 in cure costs related to certain contracts the Debtor elected to assume. Stebbins testified that S&S considered its agreement to lower its bid to be a concession to defer a fight over its credit bidding rights, but that S&S always intended to credit bid its prepetition debt if necessary. Moreover, notwithstanding the amount of DIP Financing embodied in the stalk-

ing horse bid, both Ferdinand and Stebbins testified that only $250,000 had been advanced as of the date of the bid.

The Court's order dated October 8, 2015 approving the sale procedures (the "Sale Procedures Order") set a deadline for bids of November 2, 2015, an auction date of November 5, 2015, and an objection deadline of November 12, 2015. Attached to the Sale Procedures Motion were the approved Bidding Procedures for the Auction and the asset purchase agreement executed by S&S. The Debtor served the approved form of Notice of Sale Procedures, Auction Date, and Sale Hearing on all creditors. The notice referenced the Sale Procedures Order and directed interested parties to refer to it for more information.

On October 15, 2015, the Debtor filed a Motion for Determination of Applicability and Scope of Mission Product Holdings, Inc.'s Election Pursuant to 11 U.S.C. Section 365(n)(1)(B)[5] (the "365(n) Motion"). Mission objected to the 365(n) Motion.[6] On November 12, 2015, following a contested hearing on the matter, the Court granted the 365(n) Motion, concluding that Mission retained certain nonexclusive rights to the Debtor's intellectual property, but did not retain any exclusive rights granted under the Mission Agreement. *See In re Tempnology, LLC*, 541 B.R. 1 (Bankr. D.N.H. 2015). On the same date, Mission filed a Notice of Appeal of the Court's order and the appeal remains pending.

On October 29, 2015, one week before the auction, S&S, at Ferdinand's request, advanced an additional $500,000 to the Debtor under the DIP Facility. Like

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[5] Doc. No. 211.

[6] Doc. No. 231.

the previous wire of $250,000, the $500,000 advance was initiated by Pro Con for reasons unknown but drawn on S&S's checking account. Ferdinand testified that the $500,000 advance under the DIP Facility was necessary to fund the carve-out for professional fees and expenses. In any event, on the auction date, the full amount of the DIP Financing had been advanced as was contemplated by the stalking horse bid.

On November 2, 2015, Mission placed a timely, qualified overbid consisting of a cash bid of $1,300,000.

C. ***Marketing Efforts***

Prior to the Petition Date, Phoenix developed a sales and marketing strategy that involved the preparation of a marketing teaser to entice potential buyers, a data room for the review of confidential information, and a nondisclosure agreement. Phoenix initially contacted five parties in search of a stalking horse, and received some interest from a company known as Hill Co. that had branding experience, but all declined citing the expense. Colistra testified that these parties were targeted based on their ability to understand the business, move quickly, and have the financial wherewithal to complete the transaction. Ultimately, Phoenix contacted S&S to commence stalking horse negotiations in the beginning of August, 2015.

Following the Petition Date, Phoenix sent the teaser materials to 164 potential buyers that it identified as likely prospects from a database customarily used by investment bankers. These prospects were selected based on them being in a like or similar industry as the Debtor, or industry associated with the Debtor's products. Colistra testified that Phoenix contacted a broad range of potential buyers, including liquidators, brand-

ing experts, apparel and textile companies, medical businesses, and hedge funds.

Of those sent the teaser, twenty-six responded that they were not interested, and Phoenix made an additional 112 follow-up calls in an attempt to "talk to a human being." Other than S&S, only four parties signed nondisclosure agreements and gained access to the data room, and only Mission submitted a bid that was higher than S&S's stalking horse bid. Phoenix tracked the reasons given by various potential purchasers for not submitting bids. Among the concerns raised were: (i) the opportunity was too small; (ii) the Debtor's history of losses and lack of sales; (iii) market saturation of similar products; (iv) lack of confidence in the defensibility of the Debtor's patents, particularly in light of Mission's assertion of exclusive rights; and (v) the potential of S&S to credit bid a substantial amount.

According to Colistra and McCarthy, the Debtor provided Phoenix with a "do not contact list" containing the names of businesses that Phoenix was instructed not to contact in connection with the proposed sale. The list consisted of major existing or prospective customers even though Colistra testified that major customers are often the most active bidders in sales pursuant to 11 U.S.C. § 363. McCarthy did not want vendors contacted because the Debtor's size makes it reliant on every order and he did not want to raise concerns about the Debtor's ability to fulfill orders. Notwithstanding the lack of direct marketing, a press release regarding the sale was transmitted to all customers, distributors, and other "key international players." Colistra testified that Phoenix followed its normal sales and marketing process and, given his experience with sales both in and out of bankruptcy, opined that an additional sixty-days of marketing and due diligence

would not have yielded a different result in light of the responses Phoenix received.

D. ***The Auction***

On November 5, 2015, the Debtor conducted the Auction at the offices of its counsel, Nixon Peabody. At the outset of the Auction, the Debtor made the following representations of regarding the then-present state of its assets and liabilities: (i) S&S had loaned the Debtor $750,000 under the DIP Facility; (ii) the Debtor was holding cash in the amount of $600,000; (iii) the Debtor had accounts receivable in the amount of $100,000; (iv) the Debtor had inventory of $1,200,000 at cost consisting almost entirely of finished product with sale margin of at least 20%; (v) the Debtor had postpetition accounts payable of approximately $350,000; and (vi) the "carve-out" from the sale for the Debtor's professionals totaled $400,000. Notably, under the asset purchase agreements signed by S&S and Mission, the Debtor's cash and cash equivalents were listed as acquired assets. The Debtor also explicitly reserved the right to conduct negotiations off the record.

In light of Mission's qualified overbid of $1,300,000 in cash, S&S opened bidding with a credit bid of $1,400,000, which included a prepetition credit bid, which the Debtor immediately accepted and stated was a superior bid. Mission protested S&S's credit bid of prepetition debt and reserved the right to return to its original bid, but continued to offer higher bids consisting of the Debtor's cash and cash equivalents, meaning that such cash or cash equivalents would be left in the estate and excluded from the acquired assets. In response to Mission bidding the Debtor's assets, including its accounts receivable and inventory, the Debtor announced that for purposes of the Auction the value of

the accounts receivable would be reduced from $100,000 to $80,000, and the value of the inventory was reduced from $1,200,000 to a liquidation value of $120,000. Colistra testified that this was done when he realized that it was not appropriate to utilize "book value" in this context for these assets.

After several more rounds of bidding, Mission submitted the penultimate bid of $2,600,000 (the "Mission Bid"), consisting of the following:

(i) $1,800,000 in cash paid by Mission;

(ii) $600,000 of the Debtor's cash to be left in the estate;

(iii) $80,000 of the Debtor's accounts receivable to be left in the estate; and

(iv) $120,000 of the Debtor's inventory to be left in the estate.

The Debtor accepted the Mission Bid.

Following the Mission Bid, S&S bid $2,700,000 (the "S&S Bid") consisting of the following:

(i) $750,000 credit bid of DIP Facility;

(ii) $657,000 of assumed prepetition unsecured debt at the amount scheduled by the Debtor excluding disputed claims and any rejection damage claim;

(iii) $600,000 of the Debtor's cash to be left in the estate;

(iv) $80,000 of the Debtor's accounts receivable to be left in the estate;

(v) $120,000 of the Debtor's inventory to be left in the estate;

(vi) $50,000 of assumed postpetition accounts payable; and

(vii)$443,000 credit bid of prepetition debt.

Stebbins testified that S&S altered its bidding strategy on the advice of Attorney Candon, reasoning that mirroring Mission's bid structure made it easier to compare the two bids and avoided a further challenge by Mission by reducing S&S's need to credit bid prepetition debt. Similarly, S&S incorporated the assumption of $657,000 in prepetition liabilities into its bid at Attorney Candon's advice. Indeed, Stebbins testified S&S has the financial ability to pay these claims, but that he did not know which creditors' claims were being assumed and relied on Attorney Candon to formulate this component of S&S's bid. At the Auction, S&S also reserved the right to try to renegotiate any amount of an assumed liability directly with the claimant.

At the Auction, no representations were made regarding whether the Employment Condition was waived or satisfied. At the sale hearings, both McCarthy and Ferdinand testified that they have not received employment offers from S&S, but expected such offers to be forthcoming. Stebbins testified that S&S intends to keep all eighteen of the Debtor's employees.

The Debtor accepted the S&S Bid as superior to the Mission Bid. Mission declined to bid further or be designated as the backup bidder, protesting that the Mission Bid was already best and highest. The Debtor filed a notice of successful bidder on November 6, 2015.

E. *Post-Auction Procedural History*

Mission filed the Objections on November 12, 2015, asserting, *inter alia*, that: the S&S Bid was miscalculated and inferior to the Mission Bid; S&S's credit bid-

ding rights should be denied and its claim recharacterized as equity; the sale was conducted in bad faith; and the sale must be denied as a *sub rosa* plan. On November 16, 2015, the Examiner, the Debtor, and S&S each filed responses to the Objections.[7]

The Examiner filed his final report on November 13, 2015 (the "Final Report"), which was subsequently amended with leave of the Court on November 24, 2015.[8] In the Final Report, the Examiner concluded that Mission and all other creditors will receive better treatment through the proposed sale than through the only realistic alternative—a liquidation. In support, the Examiner reasoned that in light of S&S's secured claim in the amount of $5,500,000, which he determined is not subject to a viable claim for equitable subordination and only $2,000,000 of which might be vulnerable to a recharacterization challenge, the Debtor's creditors would not receive any distribution under any other circumstances. The Examiner further opined that given the limited value of the Debtor's business and the fact that the only bidders were the parties already embroiled in litigation, additional or different marketing would not yield a different or better result.

The Court conducted an evidentiary hearing concerning the proposed sale on November 18, 2015, and November 23, 2015. At the conclusion of the hearing, the Court took the matter under advisement and directed the parties to file proposed findings by December 1, 2015. Both Mission and the Debtor filed proposed findings. Attached to the Debtor's proposed order were revised copies of the asset purchase agree-

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[7] Doc. Nos. 257, 258, 259, respectively.

[8] Doc. Nos. 252, 270.

ment signed by S&S. In addition to amending Exhibits 2.1 and 2.2 to conform the definitions of acquired assets and excluded assets to the S&S Bid, Exhibit 3.1, which states the methodology for calculating the S&S Bid, now lists prepetition liabilities totaling $657,278 to be assumed by S&S by claimant and amount to be paid by S&S.

IV. POSITIONS OF THE PARTIES

Generally, the Debtor asserts that the record reflects its marketing efforts were appropriate, the S&S Bid was higher in all respects, and the sale represents a good faith, arm's length transaction which the Court should approve. For the sake of clarity, the Court will focus on Mission's objections and the various parties' responses thereto.

A. *Mission*

Through the Objections, Mission takes issue with nearly every aspect of the sale process. From the outset, Mission argues that the Debtor and S&S have colluded to use this bankruptcy case for the sole impermissible purpose of rejecting the Mission Agreement and now seek to use the sale as a foreclosure vehicle for "notional" value. The central premise of most of Mission's complaints is the allegation that the Debtor is entirely controlled by S&S through Stebbins. As evidence of this pervasive control, Mission alleges that S&S and Stebbins have repeatedly dictated terms to the Debtor, such as the stalking horse bid and forbearance agreement, which the Debtor has accepted without negotiation.

Mission asserts that S&S should be prohibited from credit bidding its prepetition debt for cause under 11 U.S.C. § 363(k) for several reasons. First, Mission urg-

es that the Court to find that S&S has engaged in inequitable conduct as evidenced by its self-dealing and "loan to own" strategy. Second, Mission posits that S&S's credit bidding rights should be limited because the validity and amount of its secured claim is subject to a bona fide dispute and has not yet been determined. Third, Mission argues that under the standard articulated in *Aquino v. Black (In re AtlanticRancher, Inc.)*, 279 B.R. 411, 433 (Bankr. D. Mass. 2002), cause exists to recharacterize S&S's secured loans as equity and, as such, S&S's credit bid rights must be limited to the actual and necessary extension of credit under the DIP Facility.[9] In support, Mission cites the Debtor's financial history which indicates inadequate capitalization, substantial control by Stebbins, S&S's loan mirroring its controlling equity position, and the fact that no conventional lender would have loaned the Debtor money on similar terms.

Turning to the sale process, Mission contends that there was an insufficient marketing period to allow for an open and competitive sale. Mission also asserts that Phoenix's adherence to a "do not contact list" given to it by the Debtor further reflects that the Debtor intentionally did not actively market itself to companies who, according to Colistra, are often some of the most active bidders in bankruptcy sales. Indeed, Mission argues that the Debtor never even investigated any options other than a going concern sale to S&S. Additionally, Mission states that S&S's initial credit bid of ap-

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[9] Although the specter of equitable subordination was raised early in this case, Mission has not advanced an argument under that theory in the Objections or requested any relevant findings in its proposed findings of fact.

proximately $7,000,000 chilled interest in the sale process.

Mission also cites several flaws and/or incidences of inequitable conduct in the Auction. Mission asserts that the Debtor's open admission that it would, and then did, negotiate bids off the record with S&S evidences collusion. Moreover, Mission complains that the Debtor's unilateral, mid-Auction announcement that it was changing the Auction values of the Debtor's inventory and accounts receivable was done for the sole purpose of devaluing Mission's bids and strengthening S&S's bidding position. Mission also notes that S&S never announced whether the Employment Condition was waived or satisfied.

Mission's primary objection to the Auction, however, is that it should have been declared the successful bidder as each of its bids were "unequivocally higher" than those of S&S. Mission suggests that the Debtor fraudulently inflated the value of each of S&S's bids, including the S&S Bid, by colluding with S&S to "park" an unnecessary advance of $500,000 under the DIP Facility in the Debtor's accounts to create a postpetition credit bid right. Because this advance did not occur until after the stalking horse bid was accepted, Mission asserts that it was overvalued from the start. Then, based on the presence of $600,000 in the Debtor's bank account at the time of the Auction, a mere week after the $500,000 advance under the DIP Facility, Mission argues the advance must have been unnecessary. Moreover, because the Debtor's cash and cash equivalents were, at least initially, acquired assets under the respective asset purchase agreements, Mission contends that S&S's credit bid would have essentially bought its own cash back, thus reducing the net value of the transaction by $500,000.

Based on that line of reasoning, Mission argues that S&S bidding the Debtor's cash results in the same asset being counted twice—first as a liability and then as an asset. According to Mission, only once S&S agrees to leave the Debtor's cash in the estate is the $500,000 loan completed, justifying a bid with a net economic value of no more than $750,000. Mission concedes, however, that the result might be different had the Debtor exhausted the DIP Facility in its operations prior to the auction. In any event, because the Mission Bid did not suffer from this mathematical infirmity, it was superior to the S&S Bid.

Mission also contests the value assigned to S&S's assumption of liabilities. In support, Mission makes much of the fact that Stebbins testified that the total amount assumed was approximately $600,000, and he did not know with specificity which claims are being assumed. This so-called "cap," coupled with a lack of clarity regarding which claims are being assumed, and S&S's admission that it could negotiate to pay less than $657,000, drive Mission to the conclusion that S&S's assumption of prepetition liabilities is impossible to value for bidding purposes.

Ultimately, Mission argues that the proposed sale to S&S will constitute a *de facto* plan that is incapable of confirmation. First, Mission contends that the proposed sale essentially creates an undefined class of unsecured creditors who will be paid in full, while the remainder will likely receive nothing under the sale or any subsequent plan. This, Mission urges, is unfair discrimination against creditors in the same class. Second, because S&S will retain its ownership of the Debtor notwithstanding this treatment of the contested unsecured creditors, Mission asserts that the proposed sale violates the absolute priority rule.

For all these reasons, Mission argues that S&S is not a good faith purchaser and the sale must be denied.

B. *The Debtor*

The Debtor argues that the record overwhelmingly supports approval of the sale. Indeed, the Debtor notes from the outset that the Examiner, a third party appointed to oversee the sale process at the request of Mission and the United States Trustee, supports the sale to S&S. Furthermore, the Debtor asserts that Mission's repeated allegations of inappropriate conduct by the Debtor and S&S are not supported by a scintilla of evidence.

To start, the Debtor states that the record reflects, and the Examiner has confirmed, that Phoenix adequately marketed the Debtor's assets, having developed a marketing strategy based on its professional experience and contacted over 160 prospective buyers in similar or associated businesses. The Debtor asserts there is no evidence that S&S influenced or interfered with Phoenix's efforts or otherwise directed the course of the sale. Moreover, the Debtor emphasizes that Colistra testified that Phoenix followed its customary procedures for such a transaction and he believed additional marketing would not have yielded a different result. In further support of that statement, the Debtor points out that one of the reasons identified by prospective buyers who declined to pursue the transaction was the ongoing dispute with Mission regarding the Mission Agreement.

The Debtor maintains that Mission's protests regarding the Auction are equally without merit. The Debtor notes that Mission did not object to its reservation of the right to conduct bid negotiations off the rec-

ord, and contends that the Debtor had conversations with all parties, Mission included, during the break. With respect to Mission's complaint about the unilateral devaluation of the Debtor's assets mid-Auction, the Debtor explains that the assets were initially given a book value because they would be acquired by the purchaser. Only once Mission began bidding the assets was it determined that a liquidation value as both necessary and appropriate for purposes of the Auction. The Debtor argues that Mission was not prejudiced by this change because the discount factor applied to both parties at the same rate.

The Debtor states that Mission's complaints that S&S is bidding only "notional" value is ironic, as S&S simply adopted Mission's bidding strategy, and undercut by Mission's assertion that the exclusion of assets from the purchase increased the value of their bid. Like the discount factor, the Debtor contends that the value of the excluded assets must be applied equally to both bids. The Debtor further characterizes Mission's claim that the Debtor's cash should not be counted as consideration for the S&S Bid as "nonsensical," arguing that leaving the $600,000 is the same as a cash bid. The Debtor emphasizes that the advances under the DIP Facility were made in accordance with the budget approved by the Court. In sum, the Debtor argues that "basic math" supports the assertion that the S&S Bid is superior to the Mission Bid in all respects.

The Debtor also contests Mission's assertions that the proposed sale is a *sub rosa* plan, and argues that it complies with 11 U.S.C. § 363. The Debtor urges that the proposed sale preserves the going concern value of the Debtor's business, while Mission's was simply a liquidating bid. The Debtor further opines that it is not uncommon for a party to assume liabilities as part of a

transaction. Finally, the Debtor states that a liquidating plan will be filed to address the disposition of the excluded assets and provide a waterfall for the remaining claim holders in a manner consistent with the Bankruptcy Code.

In sum, the Debtor argues that Mission has not pointed to any facts to support its allegations that the Debtor or S&S have acted in bad faith. The Debtor asserts that it filed the present case to reject a burdensome contract, right size its balance sheet, and emerge as a going concern. Moreover, the Debtor contends that the Debtor and S&S have gone to "extreme lengths" to preserve an arm's length transaction, and that there is no evidence that the Debtor colluded with or is controlled by S&S. In further support, the Debtor again cites the Examiner's report, which it states confirms the Debtor's position that the conduct of the sale was appropriate and that S&S's liens are valid at least in an amount sufficient to cover S&S's proposed prepetition credit bid.

C. ***S&S***

S&S supports the sale and suggests that the record amply establishes S&S is a good faith purchaser. According to S&S, Mission has attempted to cloud the issues before the Court by making inflammatory accusations regarding collusion and misconduct, but was ultimately unable to present any evidence in support of its allegations. S&S contends that the record before the Court demonstrates that neither S&S nor Stebbins have done anything to interfere with or manipulate the sale process. To the contrary, S&S posits that the testimony of all four witnesses, which was not rebutted by any witness called by Mission, shows that S&S participated in an open and fair auction.

S&S disputes Mission's assertion that there is any basis to limit its credit bidding rights. With respect to the postpetition DIP Financing, S&S argues that it indisputably loaned $750,000 as approved by the Court's interim and final orders regarding cash collateral and is entitled to credit bid that amount. With respect to its prepetition secured debt, S&S maintains that it has the right to credit bid up to $5,550,000, noting that the Examiner's independent analysis concludes that at least $3,500,000 of that claim is not subject to a viable recharacterization challenge. Thus, S&S asserts that if the Court were to estimate its claim for credit bidding purposes, the result would not affect S&S's actual credit bid of only $443,000 prepetition debt. Moreover, distinguishing the present case from the "loan to own" characterization advanced by Mission, S&S emphasizes that unlike *In re Fisker Auto. Holdings, Inc.*, 510 B.R. 55 (Bankr. D. Del. 2014), and *In re The Free Lance—Star Publ'g Co. of Fredericksburg, VA*, 512 B.R. 798 (Bankr. E.D. Va. 2014), S&S did not acquire its prepetition debt at a steep discount, but instead paid full value.

D. ***The Examiner***

The Examiner filed a response to the Objections to address "misleading" arguments and emphasize that the estate and its creditors are best served by a prompt consummation of the sale. Indeed, the Examiner posits that there is no alternative that is likely to pay the prepetition creditors. The Examiner contends there is no evidence of collusion or misconduct, and, relying on his prior report, asserts that the amount of S&S's prepetition credit bid is not subject to recharacterization. Alternatively, even if there were some collusion, which he disputes, the Examiner suggests that it is relevant only to issues under 11 U.S.C. § 363(m), and does not warrant denial of the sale.

The Examiner argues that the Court should reject Mission's "notional" consideration argument as factually incorrect. The Examiner explains that neither S&S nor the Debtor are double counting the Debtor's cash on hand because in order to compare the relative worth of the competing bids, one would compare the net equity on the Debtor's balance after each bid. Thus, on a balance sheet, the S&S Bid results in both the reduction in the Debtor's liabilities arising from the DIP Financing and assets in the amount of $600,000. For this reason, the Examiner concludes that the S&S Bid is higher and better.

The Examiner states that there is a business justification to the sale, as the assets are wasting, the sale furthers the interests of the Debtor, creditors, and equity, and does not render creditor's rights meaningless. Moreover, the Examiner opines that if the sale were denied, conversion will quickly follow as S&S would cease funding the operation. Lastly, the Examiner argues that the sale does not implicate the absolute priority rule because S&S is not receiving anything on account of its equity interest, but is instead buying the assets in exchange for its debt.

V. DISCUSSION

Section 363(f) of the Bankruptcy Code permits the sale of estate property free and clear of any interest. 11 U.S.C. § 363(f). Under 11 U.S.C. § 363(b)(1), a Chapter 11 debtor in possession may do so other than in the ordinary course of business after notice and a hearing. 11 U.S.C. § 363(b)(1); *see also* 11 U.S.C. § 1107(a) (affording a Chapter 11 debtor in possession the rights of a trustee). Section 1123(b)(4) of the Bankruptcy Code contemplates that sale of all or substantially all of Chapter 11 debtor's assets may be effectuated through

a plan, 11 U.S.C. § 1123(b)(4), but the Supreme Court of the United States has recognized that a Chapter 11 debtor may alternatively sell substantially all its assets pursuant to 11 U.S.C. § 363(b) prior to confirmation to then be followed with the confirmation of a liquidating plan. *Florida Dept. of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 128 S.Ct. 2326, 2331 n. 2 (2008). The concern raised by pre-confirmation sales is that "[s]ection 363(b) seems on its face to confer upon the bankruptcy judge virtually unfettered discretion to authorize the use, sale or lease, other than in the ordinary course of business, of property of the estate," *Comm. of Equity Sec. Holders v. The Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063, 1071 (2nd Cir. 1983), which could deny creditors the statutory protections they would otherwise receive through the Chapter 11 confirmation process by establishing the terms of a *sub rosa*, or perhaps more accurately, *de facto*, plan in connection with the sale. *See, e.g., Motorola, Inc. v. Official Comm. of Unsecured Creditors and JPMorgan Chase Bank, N.A. (In re Iridium Operating LLC)*, 478 F.3d 452, 466 (2d Cir.2007) ("The reason sub rosa plans are prohibited is based on a fear that a debtor-in-possession will enter into transactions that will, in effect, short circuit the requirements of Chapter 11 for confirmation of a reorganization plan." (internal quotation marks and alteration omitted)); *In re Braniff Airways, Inc.*, 700 F.2d 935, 940 (5th Cir. 1983) (holding that debtor may not use 11 U.S.C. § 363 to sidestep the protection creditors have when it comes time to confirm a plan of reorganization). The tension is clear—"[d]ebtors need flexibility and speed to preserve going concern value; yet one or more classes of creditors should not be able to nullify Chapter 11's requirements." *In re Chrysler LLC*, 576 F.3d 108, 116 (2d Cir.), *cert. granted, judgment vacated*

sub nom. Indiana State Police Pension Trust v. Chrysler LLC, 558 U.S. 1087, 130 S. Ct. 1015 (2009) and *vacated sub nom. In re Chrysler, LLC*, 592 F.3d 370 (2d Cir. 2010).

This Court addressed this friction in *In re Pub. Serv. Co. of New Hampshire*, 90 B.R. 575, 582 (Bankr. D.N.H. 1988), holding that it must apply a greater level of scrutiny to a proposed transaction the closer it is to the heart of the reorganization process. It found that the appropriate standard for approval of a transaction that essentially reorganizes the debtor outside the confirmation process is:

> whether good cause has been shown to implement the transaction of this stage of this proceeding i.e., does it have valid business reasons supporting it and does it make good sense in the overall context of the reorganization process? Phrased negatively, the standard might be whether the proposed transaction might improperly and indirectly lock the estate into any particular plan mode prematurely, and without the protection afforded by the procedures surrounding a disclosure statement and confirmation hearing, in a plan of reorganization.

Id. at 581. Factors that may help the Court assess the business sense and reason for the proposed transaction include:

> the proportionate value of the asset to the estate as a whole, the amount of elapsed time since the filing, the likelihood that a plan of reorganization will be proposed and confirmed in the near future, the effect of the proposed disposition on future plans of reorganization, the proceeds to be obtained from the disposition

> vis-a-vis any appraisals of the property, which of the alternatives of use, sale or lease the proposal envisions and, most importantly perhaps, whether the asset is increasing or decreasing in value.

In re Lionel Corp., 722 F.2d at 1071. The Court must also find that creditors were afforded the following protections provided through the plan confirmation process:

(1) The right of creditors to receive a disclosure statement;

(2) The power of creditors holding claims in an impaired class to vote;

(3) The entitlement of dissenting creditors and equity interest holders to a return equal to or greater than that which they would receive in a liquidation pursuant to chapter 7;

(4) The absolute priority rule; and

(5) The ability of all parties-in-interest to be heard at a confirmation hearing as to matters affecting confirmation, including good faith, continuance of management, and feasibility.

In re Isaacson Steel, Inc., Bk. No. 11-12415-JMD, 2013 WL 5428725, at *5 (Bankr. D.N.H. Sept. 25, 2013) (quoting *In re Crowthers McCall Pattern, Inc.*, 114 B.R. 877, 881 (Bankr. S.D.N.Y. 1990)); *see also Western Auto Supply Co. v. Savage Arms, Inc. (In re Savage Indus., Inc.)*, 43 F.3d 714, 720 (1st Cir. 1994) (noting that 11 U.S.C. § 363(b)(1) mirrors the court's duty under 11 U.S.C. § 1129 to independently scrutinize the debtor's reorganization plan).

Notably, section "363 sales to insiders are subject to a higher scrutiny because of the opportunity for abuse." *See In re Tidal Const. Co., Inc.*, 446 B.R. 620, 624 (Bankr. S.D. Ga. 2009). The Bankruptcy Code defines an "insider" as any director, officer, general partner, or person in control of the debtor as well as relatives of any such persons. *See* 11 U.S.C. § 101(31)(B). Insider status may also be found where and individual or entity has a relationship "close enough to gain an advantage attributable simply to affinity rather than to the course of business dealings between the parties." *Friedman v. Sheila Plotsky Brokers, Inc. (In re Friedman), 126 B.R. 63, 70 (B.A.P. 9th Cir. 1991); see Schreiber v. Stephenson (In re Emerson)*, 244 B.R. 1, 31-32 (Bankr. D.N.H. 1999) ("The legislative history of 11 U.S.C. § 101(31) states that '[a]n insider is one who has a sufficiently close relationship with the debtor that his conduct is made subject to closer scrutiny than those dealing at arms length with the debtor.'"). In this context, higher scrutiny requires a debtor to demonstrate "that the assets are being sold for the highest price attainable" and "that [the] insider transaction is the result of bona fide arm's length transaction[] and not driven by other factors." *In re Tidal Const. Co., Inc.*, 446 B.R. at 624.

A. *The Sale Procedures Afforded Creditors the Same Substantive Protections as the Confirmation Process*

Section 1125 of the Bankruptcy Code requires that plan proponents provide creditors and parties in interest a disclosure containing adequate information to allow the holder of a claim to make an informed judgment about the plan. 11 U.S.C. § 1125. Therefore, because the proposed sale of substantially all of the Debtor's

assets is the functional equivalent of a plan, the creditors and parties in interest were entitled to the functional equivalent of a disclosure statement. Here, creditors and parties in interest received the Sale Procedures Motion, the stalking horse bid, and the Notice of Sale Procedures, Auction Date, and Sale Hearing which expressly referenced the Sale Procedures Order. These documents laid out the relevant terms and procedures associated with the sale, and outlined the impact on the estate. The Court finds that creditors received adequate disclosure to determine whether they wished to object to the sale.

Next, pursuant to 11 U.S.C. § 1126, holders of a claim or interest may vote to accept or reject a plan. 11 U.S.C. § 1126. While creditors did not have the right to vote on the sale *per se*, they did have the right to file objections to both the Sale Procedures Motion and to the approval of the sale. The deadlines for doing so were noticed far in advance, and only Mission opted to do so. Under the circumstances, the Court finds that 11 U.S.C. § 1126 is satisfied. *See In re Isaacson Steel, Inc.*, 2013 WL 5428725, at *7 (finding the right to object to a proposed settlement was the functional equivalent to voting).

Similarly, creditors have the right to be heard at a confirmation hearing with respect to matters affecting confirmation. Here, the Court conducted hearings on the Sale Motion on September 18, 2015, and October 2, 2015, and a two day evidentiary hearing with respect to the proposed sale on November 18, 2015 and November 23, 2015. All hearings were appropriately noticed. Interested parties appeared and were heard both in support and opposition of the proposed sale.

Section 1129(b)(2)(B)(ii) of the Bankruptcy Code requires fair and equitable treatment for a class of impaired creditors that have not accepted the plan by mandating that "the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property." 11 U.S.C. § 1129(b)(2)(B)(ii). This provision is known as the absolute priority rule. Mission contends that the proposed sale violates the absolute priority rule because S&S will retain its equity interests while Mission, an unsecured creditor, will receive nothing. Mission's objection is factually incorrect because S&S will not retain its equity interest or receive any distribution on account of it, but is instead purchasing the Debtor's assets. Therefore, the absolute priority rule is not implicated.

A Chapter 11 plan may not unfairly discriminate among creditors of the same class. 11 U.S.C. § 1123(a)(4). The United States Court of Appeals for the First Circuit has specifically held that "all creditors of equal rank with claims against the same property should be placed in the same class." *Granada Wines, Inc. v. New England Teamsters and Trucking Indus. Pension Fund*, 748 F.2d 42 (1st Cir. 1984). Mission argues that is precisely what the proposed sale fails to do as essentially all uncontested prepetition unsecured creditors will be paid through the proposed sale while Mission will receive nothing. Again, Mission mischaracterizes the effect of the proposed sale. Admittedly, many creditors of the same class as Mission will receive payment, but that is only because S&S has assumed those liabilities as part of the consideration for the S&S Bid. The assumption of liabilities is common practice and there are sound business reasons why some are assumed while others are not. This is particu-

larly the case where a purchaser of the debtor's assets may wish to continue doing business with certain prepetition creditors. Notably, the proposed sale in this case is distinguishable from *In re CGE Shattuck*, LLC, 254 B.R. 5, 11 (Bankr. D.N.H. 2000), where a plan opponent used the promise of a discriminatory distribution to secure votes against a plan of reorganization. In sum, the Court finds that S&S's assumption of liabilities does not constitute an attempt to circumvent the Bankruptcy Code.

The final substantive protection is that the holders of claims in a class that has rejected the plan must "receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date ...." 11 U.S.C. § 1129(a)(7). As will be discussed in greater detail below, unsecured creditors would almost certainly receive nothing in a liquidation, while in comparison $50,000 of postpetition accounts payable and approximately $657,000 of prepetition unsecured debt will be assumed by S&S as part of the sale.

B. *The Proposed Sale Has a Valid Business Reason and Makes Good Sense in the Overall Context of the Reorganization*

Under the present circumstances, the business reason to proceed with the proposed sale is apparent—there is likely no alternative that will yield any benefit to the Debtor's creditors. By all accounts, the Debtor is administratively insolvent and cannot continue in Chapter 11 without DIP Financing. If the proposed sale is rejected, it is unlikely S&S will continue to fund the reorganization. Based on his investigation and ob-

servations, the Examiner has concluded that unless the sale is consummated quickly, the value of the Debtor and its assets will continue to decline. Given that S&S holds a secured claim in excess of $5,500,000, there would be no funds available for distribution in a Chapter 7 liquidation. In contrast, the proposed sale not only provides for the payment of most of the Debtor's unsecured debt, but also provides a pool of assets for the estate from which additional claims may be paid through a future liquidating plan. Therefore, in this context, a pre-confirmation sale pursuant to 11 U.S.C. § 363(b) is a logical vehicle to attempt to maximize the Debtor's value as a going concern.

The Court finds that the marketing of the Debtor's assets was sufficient and appropriate under facts of this case. Phoenix engaged in extensive marketing efforts which consisted of contacting over 160 prospective buyers that it identified using databases customarily used by investment bankers. These prospective buyers were targeted based on their business interests in an attempt to find a buyer in the same, similar, or related industry for a synergistic match. Notwithstanding these efforts, only five entities executed nondisclosure agreements to gain access to the confidential data room and only two submitted qualified bids. While Phoenix did adhere to a "do not contact" list given by the Debtor, the Debtor's rationale for doing so—concern that marketing would have jeopardized outstanding and future contracts—was reasonable and there is no evidence that it negatively impacted the sale process. To the contrary, the responses given by parties who declined to bid indicate that there was a common perception that there was little value in the sale, particularly in light of the Debtor's history of losses, S&S's credit bid, and the concern regarding the defensibility of the

Debtor's intellectual property rights against Mission. These observations support Colistra's conclusion that an additional sixty days of marketing and due diligence would not have yielded a different result.

Contrary to Mission's assertions, there is no evidence in the record establishing any misconduct or collusion in the sale process by the Debtor and S&S. Stebbins credibly testified that when it became apparent that a workout would be necessary, both Stebbins and Schleicher resigned from the management committee, the Debtor and S&S each retained independent counsel, and Stebbins took no further part in the Debtor's operations. His testimony was supported by that of McCarthy and Ferdinand, who each testified that Stebbins was not involved with the Debtor's operations post-resignation or otherwise exerting any undue influence into the Chapter 11 process.

Mission protests that S&S, through Stebbins, has on numerous occasions dictated the terms of important transactions, such as the forbearance agreement and stalking horse bid, and the Debtor has simply acquiesced without negotiation. This, however, is not a proper characterization of the record. While the salient terms of the forbearance agreement and stalking horse bid may have been initially discussed at the meeting held on July 13, 2015, the uncontroverted testimony is that the details of those agreements were negotiated later by their respective counsel. The Court further notes that agreement to a proposal, by itself, is not evidence of undue influence or collusion where the proposal is attractive and fair from the Debtor's perspective. This is particularly true where a debtor's financial status has left it with few options.

Mission points to several alleged flaws in the sale process that rendered the Auction unfair, but upon review, the Court discerns no prejudice. First, Mission argues that the stalking horse bid should not have been accepted because the full amount of the DIP Financing had not been advanced until a week before the Auction. Although it is technically true that S&S's stalking horse bid was underfunded at the time the Debtor accepted it, the issue was resolved prior to the Auction when the Debtor requested the full amount of the DIP Facility in accordance with its budgeted needs. Second, Mission complains that the Debtor engaged in off the record bid negotiations with S&S, but that was consistent with the announced procedures and Mission failed to explain how these negotiations tainted the Auction. Third, Mission objects to the Debtor's mid-Auction revaluation of the Debtor's assets—specifically the inventory and accounts receivable—as having been done purposely to devalue Mission's bids. To the extent that the same discount factor applied to both parties' bids, Mission remained on equal footing with S&S and its objection is ill-taken.

Mission asserts that collusion and misconduct are apparent by the Debtor's constant inflation of the S&S Bid's value, but simple math refutes this argument. Both the S&S Bid and the Mission Bid contain three of the same components: (i) $600,000 of the Debtor's cash to be left in the estate; (ii) $80,000 of the Debtor's accounts receivable to be left in the estate; and (iii) $120,000 of the Debtor's inventory to be left in the estate. Mission, however, contends that S&S cannot bid the Debtor's cash because that amount is already embodied in S&S's $750,000 credit bid of the DIP Facility. The DIP Financing, Mission explains, was not actually a loan until S&S agreed to leave the funds in the estate.

Ironically, if, as Mission says, the DIP Financing was not a loan, then the Debtor's cash position must be adjusted to reflect that no loan occurred, meaning that the $600,000 would not be in the estate for Mission to bid. Put simply, either the $600,000 is an asset of the estate with a corresponding liability for the DIP Facility, or it is not. Indeed, the transfer cannot be characterized one way for the Mission Bid and another for the S&S Bid. As such, Mission, by bidding the Debtor's cash, waived any argument that it was improperly advanced.

Mission's challenge to S&S's prepetition credit bid of $443,000 is equally without merit. Section 363(k) of the Bankruptcy Code provides:

> At a sale under subsection (b) of this section of property that is subject to a lien that secures an allowed claim, *unless the court for cause orders otherwise* the holder of such claim may bid at such sale, and, if the holder of such claim purchases such property, such holder may offset such claim against the purchase price of such property.

11 U.S.C. § 363(k) (emphasis added). "The right to credit bid is not absolute," and the Bankruptcy Code "plainly contemplates situations in which estate assets encumbered by liens are sold without affording secured lenders the right to credit bid." *In re Phila. Newspapers, LLC*, 599 F.3d 298, 315 (3d Cir. 2010), *as amended* (May 7, 2010). Courts have recognized inequitable conduct as cause to limit credit bidding, *see, e.g.*, *In re Free Lance—Star Publ'g Co. of Fredericksburg, VA*, 512 B.R. at 806, but it is not necessary. *See In re Philadelphia Newspapers, LLC*, 599 F.3d at 316 n.14 (3d Cir. 2010) ("A court may deny a lender the right to credit

bid in the interest of any policy advanced by the Code, such as to ensure the success of the reorganization or to foster a competitive bidding environment."). Courts have also denied the right to credit bid where "a sufficient dispute exists regarding the validity of the lien forming the basis for a credit bid." *In re Merit Grp., Inc.*, 464 B.R. 240, 252 (Bankr. D.S.C. 2011); *see In re Fisker Auto. Holdings, Inc.*, 510 B.R. 55, 61 (Bankr. D. Del. 2014) ("The law leaves no doubt that the holder of a valid lien of which has not yet been determined, as here, may not bid its lien."); *In re Medical Software Sols.*, 286 B.R. 431, 442 (Bankr. D. Utah 2002) (credit bidding permitted only if creditor has a valid security interest).

As the Court has repeatedly stated, the record is devoid of any facts to establish S&S engaged in any inequitable conduct. Mission has also failed to demonstrate a compelling reason why S&S's credit bidding rights should be limited. Although some prospective purchasers declined to bid based on S&S's ability to credit bid, others cited the uncertainty of Mission's rights to the Debtor's intellectual property as a chilling factor. Couple those economic realities with the Debtor's history of losses, and it is not surprising that S&S and Mission, the two parties with the biggest stakes in the game, were the only bidders.

The Court is also unpersuaded that S&S's secured claim is subject to a bona fide dispute. On Schedule D, the Debtor listed S&S as holding a secured claim in the amount of $5,550,000. Although S&S has not filed a proof of claim, "[a] proof of claim or interest is deemed filed under section 501 of this title for any claim or interest that appears in the schedules filed under section 521(a)(1) or 1106(a)(2)" that is not "scheduled as disputed, contingent, or unliquidated." 11 U.S.C. § 1111(a).

Despite Mission's persistent refrain that S&S's secured claim is invalid, Mission never filed an objection to the claim. Instead, Mission challenged S&S's ability to credit bid the claim in the Auction based on objections that have never been asserted. For this reason, the Court cannot find that the validity of S&S's secured claim is sufficiently in dispute to warrant a limitation of its bidding rights.

As a final basis to challenge S&S's right to credit bid its prepetition debt, Mission argues that cause exists to recharacterize the debt as equity, and as such, S&S's credit bid should be limited to necessary postpetition advances.[10] Every circuit court of appeals to consider the issue has upheld a bankruptcy court's equitable authority under 11 U.S.C. § 105(a) to recharacterize debt as equity. *See Fairchild Dornier GmbH v. Official Committee of Unsecured Creditors (In re Official Committee of Unsecured Creditors for Dornier Aviation (North Am.), Inc.)*, 453 F.3d 225, 231 (4th Cir. 2006); *Cohen v. KB Mezzanine Fund II, LP (In re SubMicron Sys. Corp.)*, 432 F.3d 448, 455 (3d Cir. 2006); *Sender v. The Bronze Group, Ltd. (In re Hedged—Invs. Assoc., Inc.)*, 380 F.3d 1292, 1298 (10th Cir. 2004); *Bayer Corp. v. MascoTech, Inc. (In re AutoStyle Plastics, Inc.)*, 269 F.3d 726, 748 (6th Cir. 2001); *Estes v. N & D Props., Inc. (In re N & D Props., Inc.)*, 799 F.2d 726, 733 (11th Cir. 1986). To determine whether to re-

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[10] Unlike Mission's proposed findings, which limits the requested relief to denying S&S the right to credit bid based on the existence of cause to recharacterize its debt, the prayer for relief contained in Mission Product Holdings, Inc.'s Objection to Conduct of Auction and Sale specifically requests that the Court actually recharacterize the debt. Regardless of the extent of the relief Mission requests, the Court finds that Mission has failed to sustain its burden.

characterize debt as equity, this Court has previously applied the multi-factor test enunciated in *In re AtlanticRancher, Inc.*, 279 B.R. at 433, and *Blasbalg v. Tarro (In Hyperion Enters., Inc.)*, 158 B.R. 555, 561 (D.R.I. 1993). *In re Felt Mfg. Co., Inc.*, 371 B.R. 589, 629 (Bankr. D.N.H. 2007); *In re Micro-Precision Techs., Inc.*, 303 B.R. 238, 246 (Bankr. D.N.H. 2003). These factors include:

> (1) The adequacy of capital contributions;
>
> (2) The ratio of shareholder loans to capital;
>
> (3) The amount or degree of shareholder control;
>
> (4) The availability of similar loans from outside lenders;
>
> (5) Certain relevant questions, such as
>
> a. whether the ultimate financial failure was caused by undercapitalization;
>
> b. whether the note included payment provisions and a fixed maturity date;
>
> c. whether a note or other debt document was executed;
>
> d. whether advances were used to acquire capital assets; and
>
> e. how the debt was treated in the business records.

In re Hyperion Enters., Inc., 158 B.R. at 561; *In re AtlanticRancher, Inc.*, 279 B.R. at 434. No one factor is decisive, and the more a transaction appears to reflect the characteristics of an arm's length negotiation, the more likely it will be treated as debt. *In re Micro-Precision Techs., Inc.*, 303 B.R. at 247.

The Court notes the record before it is sparse and does not include the relevant loan documents. Instead, Mission relies solely on the testimony of witnesses to make its case. In its submissions, Mission proposed the following finding in support of recharacterization:

> Testimony regarding the Debtor's financial history indicates that it was inadequately capitalized, substantially controlled by Stebbins, and S&S's loan (the Debtor's primary alleged debt) mirrored its controlling equity position. Moreover, at the time of the creation of the Secured Line, no conventional lender would have loaned the Debtor money and thus no loan similar to the Secured Line was available from an outside lender.

Mission Product Holdings, Inc.'s Proposed Findings of Fact, Conclusions of Law, Orders for Relief, Doc. No. 278 at ¶ 106. In the first instance, the record does not support the assertion that the Debtor was substantially controlled by Stebbins. While Stebbins was a member of the management committee whose opinion was valued by the Debtor's management, he credibly testified that he has never been involved in the Debtor's operations. The remainder of the allegations make out a weak case at best.

Mission's showing for recharacterization is even more anemic when one balances the total amount of S&S's secured claim—$5,500,000—against the amount of the prepetition credit bid—only $443,000. In order to make a practical difference in this case, S&S's claim would have to be almost completely recharacterized as equity. The Examiner, who conducted an independent investigation into this possibility, concluded that, at best, only $2,000,000 may be vulnerable to recharacter-

ization and the remaining $3,500,000 is not. Ultimately, Mission has failed to sustain its burden of showing that S&S's debt should be recharacterized in any amount, for any purpose.

The final component of the S&S Bid that Mission attacks is the assumption of prepetition unsecured debt in the aggregate amount of $657,000. Although it is not entirely clear why, Mission insists that this consideration is too vague and uncertain to be ascribed any value. Presumably, the basis for this assertion is Stebbins' testimony that he did not know which liabilities would be assumed and his understanding that the amount was approximately $600,000.

The bid, as articulated at the Auction, was:

> [S&S] would assume all pre-petition liabilities except for those liabilities that are scheduled as disputed or that are as a result of rejection damages claims. And for those that are unliquidated or contingent but not disputed, they would assume those debts at the scheduled amount, the debtor's scheduled amount. The debtor's schedules reflect that this would be a value of $657,000.

Exhibit 104 at 36:13-21. Even if the Debtor's schedules were somehow vague on this point, the Debtor's revision to Exhibit 3.1 of the asset purchase agreement as filed on December 1, 2015 now lists prepetition liabilities totaling $657,278, to be assumed by S&S, by claimant and amount to be paid by S&S. Therefore, Mission's objection is without merit.

Having addressed all of Mission's objections to the calculation of the S&S Bid, there is little question that the S&S Bid is in fact higher and better than the Mis-

sion Bid. Compared to Mission's Bid of $2,600,000, the S&S Bid provided total consideration of $2,700,000 consisting of the following:

(i) $750,000 credit bid of DIP Facility;

(ii) $657,000 of assumed prepetition unsecured debt at the amount scheduled by the Debtor excluding disputed claims and any rejection damage claim;

(iii) $600,000 of the Debtor's cash to be left in the estate;

(iv) $80,000 of the Debtor's accounts receivable to be left in the estate;

(v) $120,000 of the Debtor's inventory to be left in the estate;

(vi) $50,000 of assumed postpetition accounts payable; and

(vii)$443,000 credit bid of prepetition debt.

Under the totality of the circumstances, the Court finds that the price is fair and reasonable, particularly in light of the diminishing value of the Debtor's assets.

In conclusion, the Court finds that the proposed sale is not a *de facto* plan, that creditors were afforded protections consistent with the statutory safeguards attendant to the Chapter 11 confirmation process, that there is a valid business reason for the proposed sale outside the confirmation process, and that the proposed sale makes good sense in the overall context of the reorganization.

C. *S&S is a Good Faith Purchaser*

Section 363(m) of the Bankruptcy Code provides:

> The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

11 U.S.C. § 363(m). While the Bankruptcy Code does not specify what constitutes good faith, courts have consistently defined the term as one who purchases in good faith for value and without knowledge of adverse claims. *See Jeremiah v. Richardson*, 148 F.3d 17, 23 (1st Cir. 1998); *Oakville Dev. Corp. v. F.D.I.C.*, 986 F.2d 611, 614 (1st Cir. 1993); *Greylock Glen Corp. v. Community Sav. Bank*, 656 F.2d 1, 3-4 (1st Cir. 1981). "Typically, the misconduct that would destroy a purchaser's good faith status at a judicial sale involves fraud, collusion between the purchaser and other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders." *In re Cable One CATV*, 169 B.R. 488, 493 (Bankr. D.N.H. 1994) (citing *In re Mark Bell Furniture Warehouse, Inc.*, 992 F.2d 7, 8 (1st Cir. 1993); *In re Abbotts Dairies of Pennsylvania, Inc.*, 788 F.2d 143 (3d Cir. 1986); *In re Rock Indus. Mach. Corp.*, 572 F.2d 1195 (7th Cir. 1978)).

Based on the findings outlined above, the Court concludes that S&S purchased for value. Despite the repeated invective, Mission has failed to demonstrate that the proposed sale is anything other than an arm's

length transaction. There is no evidence of fraud, collusion, or any other tainting of the sale process in the record. To the contrary, the witness testimony reflects that Stebbins and S&S essentially divorced themselves from the Debtor when it became clear that a reorganization was needed. McCarthy and Ferdinand both testified that neither Stebbins nor S&S had any role the Debtor's operations or marketing efforts once Stebbins and Schleicher resigned from the management committee. Colistra, the professional responsible for the Debtor's marketing strategy, testified that Phoenix had no contact with S&S other than to commence stalking horse negotiations when no other could be found. Even if the initial sale proposal pre-dated the involvement of independent counsel, Stebbins, McCarthy, and Ferdinand each credibly testified that no agreement was reached until the details were negotiated by counsel. Notably, the entire sale process was overseen by the Examiner and the United States Trustee, and neither have voiced any concerns or objections. Therefore, the Court finds that S&S is a good faith purchaser entitled to the protection of 11 U.S.C. § 363(m).

VI. CONCLUSION

For the reasons stated above, the Objections are without merit and will be overruled. Accordingly, the sale is approved and the Court will enter a separate order consistent with this opinion. This opinion constitutes the Court's findings of fact and conclusions of law in accordance with Fed. R. Bankr. P. 7052.

ENTERED at Manchester, New Hampshire.

Respectfully submitted.

Dated: December 18, 2015 /s/ J. Michael Deasy
J. Michael Deasy
Bankruptcy Judge

ORDER AUTHORIZING SALE, BANKR. DKT. 307, FILED DECEMBER 18, 2015

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE

Bk. No. 15-11400-JMD
Chapter 11

IN RE: TEMPNOLOGY, LLC,
Debtor,

ORDER (A) AUTHORIZING THE SALE OF SUBSTANTIALLY ALL THE DEBTOR'S ASSETS FREE AND CLEAR OF LIENS, CLAIMS, ENCUMBRANCES, AND OTHER INTERESTS, EXCEPT AS PROVIDED IN THE SUCCESSFUL BIDDER'S ASSET PURCHASE AGREEMENT; (B) AUTHORIZING AND APPROVING THE ASSET PURCHASE AGREEMENT; (C) APPROVING THE ASSUMPTION AND ASSIGNMENT OF CERTAIN EXECUTORY CONTRACTS AND UNEXPIRED LEASES RELATED THERETO; AND (D) GRANTING RELATED RELIEF

This proceeding having come before the Court on November 18, 2015, and November 23, 2015 for evidentiary hearings on the motion (the "Motion") of the above-captioned debtor (the "Debtor") seeking entry of an order (this "Order"), pursuant to sections 105(a), 363, and 365 of the Bankruptcy Code. rules 2002, 6004, 6006, 9007, and 9014 of the Bankruptcy Rules, and LBR 6004-1, (i)(a) approving procedures in connection with

the sale of substantially all of the Debtor's assets; (b) approving the Stalking Horse Protections; (c) scheduling the related auction and hearing to consider approval of sale; (d) approving procedures related to the assumption and assignment of executory contracts and unexpired leases; (e) approving the form and manner of notice thereof; and (f) granting related relief; and (ii)(a) authorizing the sale of such assets free and clear of liens, claims, encumbrances. and other interests, except as provided by an asset purchase agreement; (b) approving the assumption and assignment of certain of the Debtor's executory contracts and unexpired leases related thereto; and (c) granting related relief, and the Court having issued its memorandum opinion of even date,

IT IS HEREBY ORDERED THAT:

1. The Motion is GRANTED.

2. All objections to the Motion, including the objections contained in the Mission Product Holdings, Inc.'s Challenge to Credit Bid of Pre-Petition Credit of Schleicher & Stebbins Hotels, LLC [Docket No. 241] and (ii) Mission Product Holdings, Inc.'s Objection to Conduct of Auction and Sale. as amended [Docket No. 246], that have not been overruled, withdrawn, waived, settled, or resolved, and all reservations of rights included therein, are hereby overruled and denied in their entirety. For purposes of clarity, the Court rules that (i) the chapter 11 case was not filed in bad faith, (ii) the contemplated sale is for adequate and reasonable consideration, (iii) that the sale does not constitute a sub rosa plan, and (iv) that in connection with the Auction and the DIP Financing, Schleicher & Stebbins Hotels, L.L.C. ("S&S" or the "Successful Bidder") acted at

all times in good faith and arms' length and did not act in bad faith.

3. The Successful Bidder's offer for the assets ("Assets") to be sold, as embodied in the Successful Bidder's Purchase Agreement, annexed hereto as Exhibit 1, is the highest or best offer for the Assets under the circumstances of this case and is hereby approved.

4. The Successful Bidder's Purchase Agreement is hereby approved pursuant to section 363(b) of the Bankruptcy Code and the Debtor is authorized to consummate and perform all of its obligations under the Successful Bidder's Purchase Agreement and to execute such other documents and take such other actions as are necessary or appropriate to effectuate the Successful Bidder's Purchase Agreement.

5. Pursuant to section 363(f) of the Bankruptcy Code, the Assets are being sold and transferred free and clear of all liens. claims, interests, and encumbrances (collectively. The "Liens") except as otherwise provided in the Successful Bidder's Purchase Agreement, with any and all such Liens to attach to proceeds of such sale with the same validity, priority, force, and effect such Liens had on the Assets immediately prior to the sale and subject to the rights, claims, defenses, and objections, if any, of the Debtor and all interested parties with respect to any such asserted Liens, provided, however, the sale of the Assets shall not be free and clear of claims Mission Product Holdings, Inc. may have pursuant to 11 U.S.C. § 365(n) as determined by a final non-appealable order by a court of competent jurisdiction.

6. Except as expressly permitted by the Successful Bidder's Purchase Agreement as to any Liens, all persons and entities. including, but not limited to, all

debt security holders, equity security holders, governmental, tax and regulatory authorities (to the fullest extent allowed by applicable law), lenders, trade creditors, contract counterparties, customers, landlords, licensors, employees, litigation claimants, and other persons, holding Liens of any kind or nature whatsoever against or in the Debtor or the Debtor's interests in the Assets (whether known or unknown, legal or equitable, matured or unmatured, contingent or noncontingent, liquidated or unliquidated, asserted or unasserted, whether arising prior to or subsequent to the commencement of this chapter 11 case, whether imposed by agreement, understanding, law, equity, or otherwise), arising under or out of, in connection with. or in any way relating to, the Debtor, the Assets, the operation of the Debtor's business before the closing under the Successful Bidder's Asset Purchase Agreement or the transfer of the Debtor's interests in the Assets to the Successful Bidder, shall not assert, prosecute, or otherwise pursue any Liens against the Successful Bidder, its property (including, without limitation. the Assets), its successors and assigns, or interfere with the Successful Bidder's title to, use, or enjoyment of the Assets, in each case, without first obtaining an order of this Court after notice and a hearing permitting such Lien to proceed.

7. Pursuant to sections 105(a) and 363(b) of the Bankruptcy Code, the sale by the Debtor to the Successful Bidder of the Assets and transactions related thereto, upon the closing under the Successful Bidder's Purchase Agreement, are authorized and approved in all respects.

8. Pursuant to section 365 of the Bankruptcy Code, the assignment and assumption of the Assumed Contracts, as identified in the Successful Bidder's Pur-

chase Agreement, by the Successful Bidder, is hereby authorized and approved in all respects. To the extent necessary or required by applicable law, the Debtor or the Successful Bidder, as applicable, has or will have as of the closing date: (i) cured, or provided adequate assurance of cure, of any default existing prior to the closing date with respect to the Assumed Contracts, within the meaning of sections 365(b)(1)(A) and 365(f)(2)(A) of the Bankruptcy Code, and (ii) provided compensation, or adequate assurance of compensation, to any party for any actual pecuniary loss to such party resulting from such default, within the meaning of section 365(b)(1)(B) of the Bankruptcy Code. The respective amounts set forth in Exhibit 2 hereto (subject to the adjustments that may be made as expressly noted on Exhibit 2 hereto) are the sole amounts necessary under sections 365(b)(l)(A) and 365(f)(2)(A) of the Bankruptcy Code to cure all such monetary defaults and pay all actual pecuniary losses under the Assumed Contracts.

9. No bulk sales law, or similar law of any state or other jurisdiction shall apply in any way to the transactions contemplated by the Successful Bidder's Asset Purchase Agreement, the Motion or this Order.

10. This is a final order and is enforceable upon entry and to the extent necessary under Rules 5003, 9014, 9021 and 9022 of the Bankruptcy Rules. This Court expressly finds and rules that there is no just reason for delay in the implementation of this Order and expressly directs entry of judgment as set forth herein and the stay imposed by Bankruptcy Rules 6004(h) and 6006(d) are hereby waived and this Order shall be effective immediately upon its entry and the Debtor is hereby authorized and directed to consummate the sale of the Assets to the Successful Bidder and to take any other

acts required or contemplated under the Successful Bidder's Asset Purchase Agreement.

11. The terms of this Order shall be binding on the Successful Bidder and its successors, the Debtor, creditors and equity interest holders of the Debtor, and all other parties in interest in the Debtor's chapter 11 case, including but not limited to, all persons asserting a claim against or interest in the estate or any of the Assets to be sold, conveyed or assigned to the Successful Bidder pursuant to the Successful Bidder's Asset Purchase Agreement, and any successors of the Debtor, including any trustee or examiner appointed in this case or upon a conversion of this case to chapter 7 of the Bankruptcy Code, and the terms of this Order shall survive and be binding in the event of any dismissal of this case.

12. The Successful Bidder is a good faith purchaser entitled to the benefits and protections afforded by section 363(m) of the Bankruptcy Code.

13. The Purchase Price to be paid for the Assets, as set forth in the Successful Bidder's Asset Purchase Agreement is fair and reasonable and may not be avoided under section 363(n) of the Bankruptcy Code.

14. Except as expressly set forth in the Successful Bidder's Asset Purchase Agreement, the Successful Bidder shall have no successor or vicarious liabilities of any kind or character. Neither the purchase of the Assets by the Successful Bidder nor the subsequent operation by the Successful Bidder of any business previously operated by the Debtor, shall cause the Successful Bidder to be deemed a successor in any respect to the Debtor's business within the meaning of any law, rule or regulation. including but not limited to any revenue, pension, ERISA, tax, labor or environmental law,

rule or regulation or under any products liability law with respect to the Debtor.

15. With respect to the transactions consummated pursuant to this Order, this Order shall be sole and sufficient evidence of the transfer of title to any particular purchaser, and the sale transaction consummated pursuant to this Order shall be binding upon and shall govern the acts of all persons and entities who may be required by operation of law, the duties of their office, or contract, to accept, file, register, or otherwise record or release any documents or instruments, or who may be required to report or insure any title or state of title in or to any of the property sold pursuant to this Order, including, without limitation, all filing agents, filing officers, title agents, title companies, recorders of mortgages, recorders of deeds, administrative agencies, governmental departments, secretaries of state, and federal, state, and local officials, and each of such persons and entities is hereby directed to accept this Order as sole and sufficient evidence of such transfer of title and shall rely upon this Order in consummating the transactions contemplated hereby.

16. The provisions of this Order are non-severable and mutually dependent.

17. Nothing contained in any plan of reorganization (or liquidation) confirmed in this case or the order of confirmation confirming any such plan of reorganization (or liquidation) shall conflict with or derogate from the provisions of the Successful Bidder's Asset Purchase Agreement or the terms of this Order.

18. This Court retains jurisdiction to interpret, implement, and enforce the provisions of, and resolve any disputes arising under or related to, this Order and the Successful Bidder's Asset Purchase Agreement, all

amendments thereto, any waivers and consents thereunder, and each of the agreements executed in connection therewith.

19. The failure specifically to include any particular provisions of the Successful Bidder's Purchase Agreement or any of the documents, agreements, or instruments executed in connection therewith in this Order shall not diminish or impair the force of such provision, document, agreement or instrument, it being the intent of the Court that the Successful Bidder's Purchase Agreement and each document, agreement, or instrument be authorized and approved in its entirety.

20. The Successful Bidder's Purchase Agreement and any related agreements, documents, or other instruments may be modified, amended, or supplemented by the parties thereto in accordance with the terms thereof without further order of the Court, provided that any such modification. amendment. or supplement does not have a material adverse effect on the Debtor's estate.

21. The Successful Bidder has the ability to credit bid its pre-petition secured claim for the Assets pursuant to section 363(k) of the Bankruptcy Code.

ENTERED at Manchester, New Hampshire.

Dated: December 18, 2015 /s/ J. Michael Deasy
J. Michael Deasy
Bankruptcy Judge

EXHIBIT 1 TO SALE ORDER
ASSET PURCHASE AGREEMENT

ASSET PURCHASE AGREEMENT

ASSET PURCHASE AGREEMENT (this "**Agreement**"), dated as of September 1, 2015, by and between Tempnology LLC, a limited liability company organized and existing under the laws of the State of New Hampshire (the "**Seller**") and Schleicher & Stebbins Hotels, L.L.C., a limited liability company organized and existing under the laws of the State of New Hampshire (including its assignees, the "**Purchaser**" and together with the Seller, each, a "**Party**" and, collectively, the "**Parties**").

WHEREAS, on September 1, 2015, the Seller filed a petition for relief under Chapter 11 of Title 11 of the United States Code (the "**Bankruptcy Code**") and, as of the date hereof, the Seller continues in possession of its assets and in the management of its business pursuant to Sections 1107 and 1108 of the Bankruptcy Code; and

WHEREAS, the Purchaser desires to purchase all assets of the Seller (other than the Excluded Assets) and to have the right to accept the assignment of certain contracts of the Seller, and the Seller desires to sell such assets and assign such contracts, if any, to the Purchaser, on the terms and conditions set forth in this Agreement and in accordance with Sections 105, 363, 365 and other applicable provisions of the Bankruptcy Code.

NOW, THEREFORE, in consideration of the promises set forth herein and in consideration of the repre-

sentations, warranties, and covenants herein contained, and for other good and valuable consideration described herein, the receipt and sufficiency of which are hereby acknowledged, the Parties hereto agree as follows:

ARTICLE I

DEFINITIONS

"**Acquired Assets**" shall have the meaning set forth in Section 2.1.

"**Affiliate**" means, with respect to any specified Person, any other Person that directly, or indirectly through one or more intermediaries, controls, is controlled by, or is under common control with, such specified Person.

"**Allocation**" shall have the meaning set forth in Section 3.3.

"**Alternative Proposal**" shall have the meaning set forth in Section 5.3(b).

"**Alternative Transaction**" shall mean a single transaction or a series of transactions involving a sale of all or substantially all of the Acquired Assets to a Third Party either pursuant to the sale process described in the Sale Procedures Order or to a Third Party that submitted a Qualified Bid (as defined in the Sale Procedures Order) provided that the sale is consummated on or before November 20, 2015, and further provided that the gross proceeds from such sale at closing are equal to or greater than the sum of what the Purchase Price would have been plus $100,000.

"**Agreement**" shall have the meaning set forth in the Preamble.

"**Ancillary Agreements**" means the Bill of Sale and the Assignment Agreement attached as **Exhibits A** and **B**.

"**Approval Order**" shall have the meaning set forth in Section 5.1(b).

"**Assigned Contracts**" shall mean the executory contracts, including leases, of the Seller set forth in **Exhibit 2.1**.

"**Assigned Permits**" shall mean the permits identified on **Exhibit C**.

"**Assignment Agreement**" shall have the meaning set forth in Section 4.2(a). "Assumed Liabilities" shall have the meaning set forth in Section 2.3.

"**Bankruptcy Code**" means the Bankruptcy Reform Act of 1978, as amended, and as codified in 11 U.S.C. Section 101, et seq.

"**Bankruptcy Court**" means the United States Bankruptcy Court for the District of New Hampshire.

"**Bill of Sale**" shall have the meaning set forth in Section 4.2(a).

"**Business**" means any and all business activities of any kind that are conducted by the Seller.

"**Business Day**" means any day except a Saturday, a Sunday or other day on which commercial banks are required or authorized to close in New Hampshire.

"**Certified Closing Reports**" shall have the meaning set forth in Section 3.1.

"**Chapter 11 Case**" means the Chapter 11 case of the Seller filed on September 1, 2015 in the Bankruptcy Court.

"**Charges**" shall have the meaning set forth in Section 12.2.

"**Claim**" means any claim, lawsuit, cause of action, demand, suit, inquiry made, hearing, investigation, notice of violation, litigation, proceeding, arbitration, or other dispute, whether civil, criminal, administrative or otherwise, including, without limitation, any and all claims as defined in section 101(5) of the Bankruptcy Code.

"**Closing**" shall have the meaning set forth in Section 4.1.

"**Closing Date**" shall have the meaning set forth in Section 4.1.

"**Confidentiality Agreement**" means the Confidentiality Agreement, dated August 12, 2015 by and between the Purchaser and the Seller.

"**Dollars**" or "**$**" means the currency of the United States of America, unless otherwise specified.

"**Deposit**" shall have the meaning set forth in Section 3.2.

"**Employee Plans**" means any pension, retirement, savings, disability, medical, dental, health, life (including, without limitation, any individual life insurance policy under which any employee of the Seller is the named insured and as to which the Seller, on behalf of the Business, makes premium payments, whether or not the Seller is the owner, beneficiary or both of such policy), death benefit, group insurance, profit-sharing, deferred compensation, stock option, stock purchase, bonus, incentive, executive compensation, vacation pay, holiday pay, severance pay, collective bargaining agreement, employment or consulting agreement, or

other employee benefit plan, trust, arrangement, agreement, policy or commitment, whether or not any of the foregoing is funded or insured and whether written or oral, which is intended to provide or does in fact provide benefits to any or all employees of the Seller, and (i) to which the Seller is party or by which the Seller (or any of the rights, properties or assets of the Seller) is bound; (ii) with respect to which the Seller has made any payments, contributions or commitments, or may otherwise have any liability (whether or not the Seller still maintains such plan, trust, arrangement, contract, agreement, policy or commitment); or (iii) under which any director, employee or agent of the Seller is a beneficiary as a result of his or her employment or affiliation with the Seller.

"**Encumbrances**" means and includes interests, contractual rights, security interests, mortgages, liens, licenses, pledges, guarantees, charges, easements, reservations, restrictions, clouds, equities, rights of way, options, rights of first refusal and all other encumbrances, whether or not relating to the extension of credit or the borrowing of money.

"**Excluded Assets**" shall have the meaning set forth in Section 2.2.

"**Excluded Liabilities**" shall have the meaning set forth in Section 2.3.

"**Expense Reimbursement**" shall mean those amounts paid by the Seller to the Purchaser in cash in an amount equal to such fees, costs and expenses actually and reasonably incurred by the Purchaser in connection with its due diligence investigation of the Seller, the negotiation and execution of this Agreement, the Ancillary Agreements and the transaction contemplated hereby and thereby, including fees and expenses

of counsel, financial advisors, accountants, experts, consultants, officers, directors, employees and other representatives or agents of the Purchaser; provided, however, that in no event shall such amount exceed, in the aggregate, $150,000.00.

"**Filing Date**" means September 1, 2015.

"**Governmental Authority**" means any foreign, United States federal, state or local government, political subdivision or governmental, regulatory or administrative authority, body, agency, board, bureau, commission, department, instrumentality or court, quasi-governmental authority, self-regulatory organization or stock exchange.

"**Intellectual Property**" shall mean intellectual property rights worldwide, including, without limitation, trademarks, service marks, trade names, service names, URLs and Internet domain names and applications therefor (and all interest therein), and general intangibles of like nature, together with goodwill related to the foregoing (including any registrations and applications for any of the foregoing); patents (including any registrations, continuations, continuations in part, renewals and applications for any of the foregoing); copyrights (including any registrations, applications and renewals for any of the foregoing); confidential or proprietary information that derives economic value (actual or potential) from not being generally known to other persons who can obtain economic value from its disclosure ; and other proprietary rights recognized under the laws of any jurisdiction in the world in concepts, ideas, designs, plans, schematics, drawings, specifications, software, databases, research and development information, tec' nology and product roadmaps, technology, confidential information, know-how, proprie-

tary technology, processes, formulae, algorithms, models, customer lists, inventions, discoveries, improvements, methodologies, architecture, structure, layouts, and inventions including the foreign and domestic patents, trademarks and trade names listed on the Attachment to Exhibit 2.1.

"**Internal Revenue Code**" means the Internal Revenue Code of 1986, as amended, together with the Treasury regulations promulgated thereunder.

"**Inventory Parts**" shall have the meaning set forth in Section 8.13.

"**Knowledge**" and similar terms shall mean and refer only to matters actually known or that should have been known to Richard Ferdinand and Kevin McCarthy, and any such knowledge that either Richard Ferdinand or Kevin McCarthy should have had following a reasonable investigation in the course of their duties on behalf of Seller.

"**Law**" or "**Laws**" means any and all statutes, laws, ordinances, proclamations, regulations, orders, decrees, consent decrees and rules of any Governmental Authority, in each case, as amended and in effect from time to time.

"**Leased Property**" shall mean all of the Seller' s leasehold interest in the property set forth in **Exhibit I-A**.

"**Lender**" means Schleicher & Stebbins Hotels, L.L.C.

"**Liability**" means any liability or obligation of any nature, whether known or unknown, liquidated or unliquidated, asserted or unasserted, matured or un-

matured, fixed or contingent, secured or unsecured, accrued, absolute or otherwise.

"**Liens**" means all liens, claims, judgments, licenses, subleases, encumbrances, mortgages, pledges, security interests, conditional sales agreements, charges, options, rights of first refusal, reservations, restrictions or other encumbrances or defects in title of any kind.

"**Material Adverse Effect**" means the loss or damage of a material portion of the Acquired Assets, whether through accident, misuse, theft, sabotage, natural disaster or other cause.

"**Offer Letters**" shall have the meaning set forth in Section 9.1(k).

"**Ordinary Course of Business**" means the operation of the Business in the ordinary course of business consistent with the Seller's usual and customary practices in managing and operating the Business.

"**Party**" or "**Parties**" shall have the meaning set forth in the Preamble.

"**Person**" means and includes any individual, any legal entity, including, without limitation, any partnership, joint venture, corporation, limited liability company, trust, or unincorporated organization, and any Governmental Authority.

"**Post-Closing Period**" means the period of time commencing with and following the Closing Date.

"**Pre-Closing Period**" means the period of time prior to the Closing Date. "Proposed Sale" shall have the meaning set forth in Section 5.l(a). "Purchase Price" shall have the meaning set forth in Section 3.1.

"**Purchase Protection Superpriority Claim**" shall have the meaning set forth in Section 5.2(b).

"**Purchaser**" shall have the meaning set forth in the Preamble.

"**Purchaser Closing Certificate**" shall have the meaning set forth in Section 10.1(a).

"**Sale Approval Date**" shall have the meaning set forth in Section 5.1(b).

"**Sale Hearing**" shall have the meaning set forth in Section 5.1(a).

"**Sale Procedures**" shall have the meaning set forth in Section 5.1(a).

"**Sale Procedure Order**" shall have the meaning set forth in Section 5.1(a).

"**Secured Loans**" means the outstanding obligations of Seller to Lender as evidenced by that certain Loan and Security Agreement dated June 4, 2013, as amended and in effect as of the Filing Date, together with all related documents and agreements, by and between the Seller and People's United Bank as lender, which, on July 31, 2014, such interest was purchased by and assigned to the Lender and that certain Post-Petition Loan and Security Agreement dated September 1, 2015, by and between the Seller and Lender.

"**Seller**" shall have the meaning set forth in the Preamble.

"**Seller Closing Certificate**" shall have the meaning set forth in Section 9.1(a).

"**Seller's Employee Plans**" means all of the Seller's Employee Plans set forth on **Exhibit 1-B**.

"**Tax**" or "**Taxes**" means any foreign, United States federal, state or local income, gross receipts, license, payroll, employment, excise, severance, stamp, occupa-

tion, premium, windfall profits, environmental, customs duties, capital stock, franchise, profits, withholding, social security (or similar), unemployment, disability, real property, personal property, sales, use, transfer, registration, value added, alternative or add-on minimum, estimated or other tax of any kind whatsoever, including all estimated taxes, deficiency assessments and any interest, penalty or addition thereto.

"**Third Party**" shall mean any Person other than the Seller, the Purchaser or any of their respective Affiliates.

"**Transferred Employees**" shall have the meaning set forth in Section 8.8(a).

ARTICLE II

PURCHASE AND SALE OF ACQUIRED ASSETS; ASSUMPTION OF LIABILITIES

Section 2.1 Purchase and Sale of Acquired Assets. Subject to and upon the terms and conditions of this Agreement, the Purchaser shall purchase from the Seller, and the Seller shall grant, transfer, sell, convey, assign and deliver to the Purchaser, as a good faith purchaser for value within the meaning of Section 363(m) of the Bankruptcy Code, free and clear of all claims, Liens and Encumbrances, all rights, title and interest of the Seller in and to all of its assets, properties and businesses, wherever located, as the same existed immediately prior to the Closing, excluding only the Excluded Assets (collectively, the "**Acquired Assets**"). The Acquired Assets include, but are in no way limited to, the items set forth on **Exhibit 2.1**. At any time before the Closing, the Purchaser may add one or more contracts or leases to the Assigned Contracts list

set forth in **Exhibit 2.1**. In the event any Assigned Contracts are assigned to the Purchaser, the Purchaser shall be responsible for payment of any and all cure costs relating to the assignment of any such Assigned Contracts and shall be responsible for any and all other obligations arising out of the assignment as provided for by section 365 of the Bankruptcy Code.

Section 2.2 Excluded Assets. Notwithstanding Section 2.1, the Seller will not be required to sell or transfer to the Purchaser, and the Acquired Assets shall not include, the assets or any right or interest in or to any of the assets specifically set forth on **Exhibit 2.2** (collectively, the "**Excluded Assets**").

Section 2.3 No Assumption of Liabilities. Except as expressly set forth in this Section 2.3, the Purchaser shall not assume and under no circumstance shall the Purchaser be obligated to pay, perform or discharge, and none of the Acquired Assets shall be or become liable for or subject to, any Liabilities or other obligations of the Seller ("**Excluded Liabilities**"). The Purchaser shall perform and discharge, when due, to the extent existing on or after the Closing: (i) all obligations and other Liabilities under or relating to the Assigned Contracts, if any, and the Assigned Permits; (ii) the Liabilities for Transferred Employees as described in Section 8.8; (iii) prepetition general unsecured debt at the amount scheduled by the Seller in the aggregate amount of approximately $657,000 excluding prepetition debt scheduled as disputed and any rejection damage claim and (iv) postpetition trade accounts payable of approximately $50,000 (excluding rejection damages claims or alleged litigation claims); (v) all obligations and other Liabilities of the Seller relating to any of the taxes, charges, fees and expenses that the Purchaser is required to bear and pay pursuant to Section 12.2; and

(vi) all cure costs arising under Section 365(b) of the Bankruptcy Code (collectively, the "**Assumed Liabilities**"). All other Liabilities of the Seller shall remain the sole responsibility of the Seller and shall be retained, paid, performed and discharged, if at all, solely by the Seller.

ARTICLE III

PURCHASE PRICE; PAYMENT OF PURCHASE PRICE; DEPOSIT: ALLOCATION OF PURCHASE PRICE

Section 3.1 Purchase Price; Payment of Purchase Price. As consideration for the sale, conveyance, transfer and assignment of the Acquired Assets, the Purchaser will deliver, or cause to be delivered to Seller pursuant to Section 363(k) of the Bankruptcy Code, an acknowledgement that it has accepted title to the Acquired Assets in satisfaction of $1,193,000 of the Seller's outstanding obligations to Lender pursuant to the Secured Loans, comprising of $443,000 of the Lender's prepetition secured debt and $750,000 of the Lender's postpetition secured debt..

The amount set forth above, together with the Assumed Liabilities, shall be referred to herein as the "**Purchase Price**".

The Purchase Price equals $1,900,000.00,calculated as reflected on **Exhibit 3.1** hereto.

Section 3.2 [RESERVED]

Section 3.3 Allocation of the Purchase Price. The Purchase Price shall be allocated among the Acquired Assets and, to the extent appropriate, the Ancillary Agreements as of the Closing Date in accordance with

Exhibit 3.3 (the "**Allocation**"). The Allocation will be determined in a manner consistent with this Section 3.3 and Section 1060 of the Internal Revenue Code. For all Tax purposes, the Purchaser and the Seller agree to report the transactions contemplated in this Agreement in a manner consistent with the terms of this Agreement, including the Allocation under **Exhibit 3.3**, except as provided below, and that neither Party will take, or permit any of its Affiliates or representatives to take, any position inconsistent therewith in any Tax return, in any refund claim, in any Tax litigation, or otherwise except as required by a final determination within the meaning of Section 1313(a) of the Internal Revenue Code or any equivalent provision of any applicable state or local Law. Each Party will promptly provide the other Party with any additional information required to complete Form 8594 if the filing of such form is required. Each Party will timely notify the other Party, and will timely provide the other Party with assistance, in the event of an examination, audit or other proceeding regarding the Allocation.

ARTICLE IV

CLOSING

Section 4.1 Closing. Subject to the terms and conditions of this Agreement and the sale order, the closing of the purchase and sale of the Acquired Assets (the "**Closing**") will be at 1:00 P.M. Eastern Standard Time at the offices of Nixon Peabody LLP located at 900 Elm Street, Manchester, NH 03101, or at such other time and location agreed to by the Purchaser and the Seller, on the second Business Day following the satisfaction or waiver of the last to be satisfied or waived of the conditions set forth in Articles IX and X (other than

those conditions that by their nature are to be satisfied at the Closing) (the date of the Closing being herein referred to as the "**Closing Date**").

Section 4.2 Deliveries by the Seller at the Closing. At the Closing, the Seller will deliver, or cause to be delivered, to the Purchaser:

(a) (i) a bill of sale (the "**Bill of Sale**") and (ii) an assignment agreement (the "**Assignment Agreement**"), substantially in the forms of **Exhibit A** and **Exhibit B**, respectively, each executed by Seller;

(b) a domain name assignment agreement substantially in the form of **Exhibit C**, executed by Seller;

(c) a trademark assignment agreement substantially in the form of **Exhibit D** and a patent assignment agreement substantially in the form of **Exhibit E**, each executed by Seller;

(d) a certified resolution of the Board of Directors and members of the Seller authorizing the sale of the Acquired Assets, the execution and delivery of this Agreement, the Ancillary Agreements and all other documents and agreements delivered in connection herewith by officers of the Seller and consummation of the transactions contemplated hereby and thereby;

(e) physical possession of all of the Acquired Assets wherever located;

(f) evidence that the Seller has changed its name to one that does not incorporate either of the words "Tempnology" or "Coolcore";

(g) possession and physical occupancy of the Leased Property together with all keys to the structures located on such Leased Property in Seller's possession;

(h) evidence of payment by Seller of an estimate of all real property and personal property Taxes, assessments and similar charges to be levied with respect to the Acquired Assets for the Pre-Closing Period, in accordance with Section 8.6; and

(i) the documents described in Sections 9.1(a) and 9.1(k).

Section 4.3 Payment of the Purchase Price. At the Closing, in accordance with Section 3.1, the Purchaser will tender to Seller a counter signed Bill of Sale pursuant to which the Purchaser expressly acknowledges that it is receiving marketable title to the Acquired Assets as payment of $1,193,000 of the amount then due and owing from Seller to Lender under the Secured Loans.

Section 4.4 Further Assurances.

(a) Each Party will from time to time, at the reasonable request of any other Party, execute and deliver such other instruments of conveyance and transfer and such other instruments, documents and agreements and take such other actions as such other Party may reasonably request or as may be reasonably requested by any applicable Governmental Authorities or third parties, in each case in order to consummate and make effective any of the transactions contemplated hereby and to vest in the Purchaser the right, title and interest in, to and under the Acquired Assets, to assist the Purchaser in the transfer, assignment, collection and reduction to possession of the Acquired Assets (and the exercise of rights with respect thereto); provided that the requesting Party will prepare any additional documents and instruments and will handle any submission, application, processing, recording and registration and bear all expenses related thereto. Without limiting the

provisions of Section 12.4, the Parties hereby irrevocably consent to the personal and subject-matter jurisdiction of the Bankruptcy Court for all purposes necessary to effectuate this Section 4.4.

(b) The Purchaser will return any records the Seller inadvertently delivers to the Purchaser that are or are reasonably likely to be attorney-client privileged or considered attorney work product or which the Purchaser realizes are or are likely to be attorney-client privileged or considered attorney work product.

ARTICLE V

BANKRUPTCY COURT MATTERS

Section 5.1 Bankruptcy Court Orders.

(a) No later than five (5) Business Days after execution of this Agreement, the Seller shall file a motion that seeks the entry of an order substantially in the form of **Exhibit 5.1(a)** (the "**Sale Procedure Order**") approving, among other things, the procedures in connection with (i) the Seller's request to sell and assign, as applicable, the Acquired Assets to the Purchaser pursuant to this Agreement and Sections 363 and 365 of the Bankruptcy Code, free and clear of all Claims, Liens or Encumbrances in or on the Acquired Assets (the "**Proposed Sale**" and the hearing to consider approval of the Proposed Sale, the "**Sale Hearing**"), (ii) establishing notice and service requirements to all creditors and parties in interest of the Proposed Sale and the Sale Hearing (including the Internal Revenue Service and all other Tax authorities with jurisdiction over the Seller or the Acquired Assets), (iii) approving the payment of the Expense Reimbursement in the event the conditions described in Section 5.2(a) are met,

(iv) establishing a deadline for the submission of competing bids for the Acquired Assets and (v) establishing thresholds for initial overbids, the bidding procedures and setting a date for the Sale Hearing (collectively, the "**Sale Procedures**") as set forth in the Sale Procedures Order. For the avoidance of doubt, in the event that the Expense Reimbursement is due to the Purchaser, the payment of the Expense Reimbursement shall be the sole and exclusive remedy of the Purchaser against the Seller. Notwithstanding the foregoing, if the Lender is not the Purchaser, Lender shall retain all of its rights and remedies as a secured creditor until it receives payment of the Purchase Price.

(b) The order approving the Proposed Sale (the "**Approval Order**") will be substantially in the form of **Exhibit 5.1(b)**, and the motions and proofs of service relating to the Approval Order will be in form and substance reasonably satisfactory to the Purchaser; *provided, however*, that in no event shall the Purchaser have the right to disapprove the Approval Order or terminate this transaction by reason of the Seller's inability to assign any or all of the Assigned Contracts if such failure is due to the Bankruptcy Court's determination that the Purchaser has failed to provide adequate assurance of future performance to the counter party, it being acknowledged and agreed that the Purchaser shall bear sole responsibility for providing such adequate assurance. Upon timely docketing of the Approval Order (such docketing date being referred to herein as the "**Sale Approval Date**"), the conditions set forth in this Section 5.1(b) shall conclusively be deemed satisfied.

(c) Subject to the Seller's obligations to comply with any order of the Bankruptcy Court (including, without limitation, the Sale Procedures), the Seller and

the Purchaser will promptly make any filings, take all actions and use commercially reasonable efforts to obtain any and all other approvals and orders necessary or appropriate for consummation of the transactions contemplated hereby. The Seller shall use its reasonable best efforts to have the Bankruptcy Court enter the Approval Order as soon as reasonably practicable after the conclusion of the Sale Hearing. The Seller shall use its reasonable best efforts to cause the Sale Procedures Order and the Approval Order to become final orders as soon as possible after their entry.

(d) The Seller shall promptly provide the Purchaser with drafts of all documents, motions, orders, filings or pleadings that the Seller proposes to file with the Bankruptcy Court which relate to the consummation or approval of this Agreement and to the extent practicable will provide the Purchaser with reasonable opportunity to review such filings. The Seller will also promptly provide the Purchaser with written notice and copies of any notice of appeal and any motion or application filed in connection with any appeal from or application for reconsideration of, any of such orders and any related briefs.

Section 5.2 Expense Reimbursement and Overbid Provisions.

(a) In the event that this Agreement is terminated for any reason other than pursuant to Section 11.1(c) [or 11.1(i)] and any Alternative Transaction is consummated, then the Seller, at the closing of any such Alternative Transaction, pay to the Purchaser the Expense Reimbursement.

(b) Pursuant to Bankruptcy Code Section 364(c)(1), the Expense Reimbursement shall receive superpriority administrative claim status. Pursuant to Bankrupt-

cy Code Section 364(c)(1), the administrative claims in respect of the Expense Reimbursement shall have priority over any and all administrative expenses of the kinds specified in Bankruptcy Code Sections 503(b), 506(c), 507(a) or 507(b) (the "**Purchaser Protection Superpriority Claims**").

(c) The rights of the Purchaser to the Expense Reimbursement and the Purchaser Protection Superpriority Claims shall all survive rejection or breach by the Seller of this Agreement, and shall be unaffected thereby.

(d) The Sale Procedure Order shall provide for, among other things, that any Alternative Proposal includes a purchase price having a value at least $250,000.00 greater than the Purchase Price.

Section 5.3 Limited Exclusivity. After execution of this Agreement, the Seller and its directors, officers, employees, representatives and agents may provide information (public or non-public) to any Person in connection with making a proposal as part of the Section 363 sale process contemplated by this Agreement and in accordance with the Sale Procedures (an "**Alternative Proposal**"), or have discussions with such Person with respect to such information as it relates to the making of such proposal, including without limitation, Persons with whom the Seller has previously provided such information, provided, however, that the Seller shall only be permitted to enter into an agreement for an Alternative Proposal to the extent permitted under the Sale Procedure Order.

Section 5.4 No Warranty. As of the Closing, the Purchaser hereby acknowledges and agrees, notwithstanding any provision contained herein, in the Ancillary Agreements, in the Seller Closing Certificate or in

any other agreement, document or certificate delivered in connection with the transactions contemplated herein, that the Seller makes no representations or warranties whatsoever, express or implied, with respect to any matter relating to the Acquired Assets (including income to be derived or expenses to be incurred in connection with the Acquired Assets, the physical condition of any personal property or any tangible or intangible personal property comprising a part of the property or assets which are the subject of any of the Assigned Contracts, if any, to be assumed by the Purchaser at the Closing; the environmental condition or other matter relating to the physical condition of any property or improvements (or any portion thereof); the merchantability or fitness of the Acquired Assets for any particular purpose; or any other matter or thing relating to the Acquired Assets (or any portion thereof)). Without in any way limiting the foregoing, the Seller hereby disclaims any warranty (express or implied) of merchantability or fitness for any particular purpose as to any portion of the Acquired Assets. The Purchaser has conducted and shall conduct its own independent due diligence and shall have no claims or causes of action against the Seller or the Seller's directors, officers, employees, agents, attorneys, representatives or lenders, including without limitation the Lender, and such lenders' directors, officers, employees, agents, attorneys, representatives arising out of or relating to the inaccuracy of the Seller's representations and warranties, or the incompleteness of or failure to disclose any information provided to the Purchaser or failure to disclose any information to the Purchaser in connection with this Agreement. Accordingly, the Purchaser will accept the Acquired Assets at the Closing **"AS-IS," "WHERE IS" and "WITH ALL FAULTS."**

ARTICLE VI

REPRESENTATIONS OF THE SELLER

The Seller represents and warrants to the Purchaser as follows:

Section 6.1 Corporate Power and Authority. Subject to compliance with applicable provisions of the Bankruptcy Code and orders of the Bankruptcy Court, the Seller has the corporate power and authority to own, lease and operate its properties and to conduct its business as is presently conducted and as conducted prior to the suspension of the manufacturing operations of the Seller.

Section 6.2 Existence and Good Standing. The Seller is a limited liability company duly incorporated, validly existing and in good standing under the laws of the State of New Hampshire. The Seller is duly qualified as a foreign corporation in the jurisdictions set forth on Schedule 6.2 and is in good standing in each jurisdiction in which such qualification is required by law, except where the failure to be so qualified or to be in good standing has not had, or would not reasonably be expected to have, a materially detrimental impact on the Acquired Assets.

Section 6.3 Authority; No Consents. Subject to compliance with the applicable provisions of the Bankruptcy Code and the entry by the Bankruptcy Court of the Approval Order prior to the Closing, the execution, delivery and performance by the Seller of this Agreement and the Ancillary Agreements to which it is a party and the consummation of the transactions contemplated hereby and thereby have been duly and validly authorized by all necessary corporate action on the part of the Seller and this Agreement has been, and the

Ancillary Agreements to which it is a party when executed and delivered by the Seller will be, duly and validly executed and delivered and the valid and binding obligations of the Seller, enforceable against it in accordance with their respective terms, subject to (i) laws of general application relating to bankruptcy, insolvency and the relief of debtors and (ii) rules of law governing specific performance, injunctive relief and other equitable remedies. Subject to compliance with the applicable provisions of the Bankruptcy Code and the entry by the Bankruptcy Court of the Approval Order prior to the Closing neither the execution, delivery and performance of this Agreement or the Ancillary Agreements to which the Seller is a party, the consummation by the Seller of the transactions contemplated hereby or thereby, nor compliance by the Seller with any provision hereof or thereof will (I)(A) conflict with, (B) result in any violation of, (C) cause a default under (with or without due notice, lapse of time or both), (D) give rise to any right of termination, amendment, cancellation or acceleration of any obligation contained in or the loss of any benefit under or (E) result in the creation of any Encumbrance on or against any assets, rights or property of the Seller under (x) any instrument or agreement to which the Seller is a party, or by which the Seller or any of its properties, assets or rights may be bound or (y) any term, condition or provision of any law, statute, rule, regulation, order, writ, injunction, decree, permit, concession, license or franchise of any Governmental Authority applicable to the Seller or any of its properties, assets or rights, other than any such conflict, violation, default, right, loss or Encumbrance that is pre-empted, overruled, superseded or made inapplicable by the Bankruptcy Code, by bankruptcy law, or by the Approval Order, and other than any such conflict, violation, default, right, loss or Encumbrance that

would not have a materially detrimental impact on the Acquired Assets, or (II) conflict with or result in any violation of the Seller's Certificate of Formation or operating agreement. With the exception of the Approval Order, no permit, authorization, consent or approval of or by, or any notification of or filing with, any Governmental Authority is required to be made or obtained by the Seller in connection with the execution, delivery and performance by the Seller of this Agreement or the Ancillary Agreements or the consummation by the Seller of the transactions contemplated hereby or thereby. With the exception of the Approval Order, the Seller is not and will not be required to obtain any consent from any Person, in connection with the execution, delivery or performance of this Agreement or any of the Ancillary Agreements or the consummation of any of the transactions contemplated hereby or thereby. Additionally, to the Seller' s knowledge, it is: (i) in compliance with all laws; (ii) not infringing on the intellectual property rights of any third party; (iii) not experiencing the infringement upon the Seller's intellectual property rights, and (iv) not violating any environmental laws.

ARTICLE VII

REPRESENTATIONS OF THE PURCHASER

Representations of the Purchaser. The Purchaser represents and warrants to the Seller as follows:

Section 7.1 Existence and Good Standing; Authorization and Validity of Agreement.

(a) The Purchaser is a limited liability company duly organized, validly existing and in good standing under the laws of the State of New Hampshire. The

Purchaser is duly qualified as a foreign corporation and is in good standing in each jurisdiction in which such qualification is required by law, except where the failure to be so qualified or to' be in good standing would not prevent, interfere or delay the Purchaser from performing its obligations under this Agreement or the consummation of the transactions contemplated by this Agreement. The Purchaser has the corporate power and authority to own, lease and operate its properties and to conduct its business as is presently conducted

(b) The execution, delivery and performance by the Purchaser of this Agreement and the Ancillary Agreements to which it is a party and the consummation of the transactions contemplated hereby and thereby have been duly and validly authorized by all necessary corporate action on the part of the Purchaser and this Agreement has been, and the Ancillary Agreements to which it is a party when executed and delivered by the Purchaser will be, duly and validly executed and delivered and the valid and binding obligations of the Purchaser, enforceable against it in accordance with their respective terms, subject to (i) laws of general application relating to bankruptcy, insolvency and the relief of debtors and (ii) rules of law governing specific performance, injunctive relief and other equitable remedies. To the best of Purchaser's knowledge, neither the execution, delivery and performance of this Agreement or the Ancillary Agreements to which the Purchaser is a party, the consummation by the Purchaser of the transactions contemplated hereby or thereby, nor compliance by the Purchaser with any provision hereof or thereof will (I) (A) conflict with, (B) result in any violation of, (C) cause a default under (with or without due notice, lapse of time or both), (D) give rise to any right of termination, amendment, can-

cellation or acceleration of any obligation contained in or the loss of any benefit under or (E) result in the creation of any Encumbrance on or against any assets, rights or property of the Purchaser under any term, condition or provision of (x) any instrument or agreement to which the Purchaser is a party, or by which the Purchaser or any of its properties, assets or rights may be bound or (y) any law, statute, rule, regulation, order, writ, injunction, decree, permit, concession, license or franchise of any Governmental Authority applicable to the Purchaser or any of its properties, assets or rights, other than any such conflict, violation, default, right, loss or Encumbrance that would not (i) have a Material Adverse Effect on the business, capitalization, assets (tangible or intangible), Liabilities or operations of the Purchaser or (ii) prevent, interfere or delay the Purchaser from performing its obligations under this Agreement or the consummation of the transactions contemplated by this Agreement, or (II) conflict with or result in any violation of the Purchaser's charter documents or operating agreement. With the exception of the Approval Order, no permit, authorization, consent or approval of or by, or any notification of or filing with, any Governmental Authority is required to be made or obtained by the Purchaser in connection with the execution, delivery and performance by the Purchaser of this Agreement or the Ancillary Agreements or the consummation by the Purchaser of the transactions contemplated hereby or thereby. With the exception of the Approval Order, the Purchaser is not and will not be required to obtain any consent from any Person, in connection with the execution, delivery or performance of this Agreement or any of the Ancillary Agreements or the consummation of any of the transactions contemplated hereby or thereby.

Section 7.2 Broker's or Finder' s Fees. No agent, broker, Person or firm is, or will be, entitled to any commission or broker's or finder' s fees from any Party, or from any Affiliate of any Party, in connection with any of the transactions contemplated by this Agreement based upon arrangements made by or on behalf of the Purchaser.

ARTICLE VIII

ADDITIONAL AGREEMENTS

Section 8.1 Operation of Business.

(a) Except as may be necessary to carry out any of the transactions contemplated by this Agreement or the Ancillary Agreements, or as may be necessary to satisfy the cure requirements of any of the Assigned Contracts, or as consented to by the Purchaser, or as required by the Bankruptcy Code or any orders entered by the Bankruptcy Court in the Chapter 11 Case, or as otherwise required by applicable Law, the Seller shall not:

(i) sell, lease, license, sublicense, encumber or dispose of any Acquired Assets, except for the sale of inventory and collection of accounts receivable in the Ordinary Course of Business provided, however, that the Seller and the Lender shall not solicit, encourage nor seek to (A) collect any accounts receivable in any fashion than is sooner or more aggressive than the terms of existing purchase orders nor earlier than the Seller's customary practice; (B) discount any accounts receivable without the prior written consent of the Purchaser; or (C) sell any inventory at prices that are less than fair market value or on terms that are not substantially the same as the majority of existing purchase orders;

(ii) enter into any agreement or commitment or engage in any transaction which is not in the Ordinary Course of Business;

(iii) take any action to waive or compromise any material Claims (whether or not asserted in any pending litigation) which are included in the Acquired Assets;

(iv) agree in writing or otherwise to take any of the foregoing actions; or

(v) terminate any employees of the Seller or hire any additional employees; provided, however, the Seller may reduce the hours of the shippers and the accounting staff.

(b) Except as may be necessary to carry out any of the transactions contemplated by this Agreement or the Ancillary Agreements, or as may be necessary to satisfy the cure requirements of any of the Assigned Contracts, or as consented to by the Purchaser, or as required by the Bankruptcy Code or any orders entered by the Bankruptcy Court in the Chapter 11 Case or otherwise required by applicable Law, the Seller shall conduct its operations in the Ordinary Course of Business, and shall:

(i) operate the Business substantially in accordance with the budget approved by the Purchaser and report weekly to the Purchaser concerning the status of its business, operations and finances;

(ii) keep in full force and effect, without amendment, all material rights relating to the Acquired Assets;

(iii) maintain in full force and effect all ex1stmg insurance with respect to the Acquired Assets and the

Business through the Closing Date in amounts not less than those in effect on the date hereof;

(iv) comply with all Laws applicable to the operations of the Business;

(iv) cooperate with the Purchaser and assist the Purchaser in identifying the permits and governmental authorization required by the Purchaser to operate the Business from and after the Closing Date and either transferring existing permits and governmental authorities of the Seller to the Purchaser; where permissible, or obtaining new permits and governmental authorizations for the Purchaser; and

(v) maintain all books and records of the Seller relating to the Business m the Ordinary Course of Business;

Section 8.2 Review of the Seller. Subject to the provisions of the Confidentiality Agreement and applicable laws and regulations, prior to the Closing Date, the Seller will, after receiving reasonable advance notice from the Purchaser, give the Purchaser full access to the premises, the books and records (excluding records which are attorney-client privileged or considered attorney work product) and employees and agents of the Seller that relate to the Acquired Assets during normal working hours, for the sole purposes of enabling the Purchaser (i) to further investigate, at the Purchaser's sole expense, the Acquired Assets and any other appropriate matters gernlane to the subject matter of this Agreement and the Ancillary Agreements and (ii) to verify the accuracy of the representations and warranties set forth in Article 6.

Section 8.3 Reasonable Efforts; Cooperation; Consents and Approvals. Subject to their respective obli-

gations to comply with any order of the Bankruptcy Court, each of the Parties agrees to use its commercially reasonable efforts to take, or cause to be taken, all action to do or cause to be done, and to assist and cooperate with each other Party in doing, all things necessary, proper or advisable to consummate and make effective, in the most expeditious manner practicable, the transactions contemplated by this Agreement (in each case, to the extent that the same is within the control of such Party), including, without limitation, (i) compliance with any Bankruptcy Court approvals, consents and orders, (ii) the defending of any lawsuits or any other legal proceedings whether judicial or administrative, challenging this Agreement, the Ancillary Agreements or the consummation of the transactions contemplated hereby and thereby and (iii) causing the conditions set forth in Articles IX and X to be satisfied. Except as otherwise expressly set forth in the Sale Procedures, the Seller will use its commercially reasonable efforts to (i) obtain from the Bankruptcy Court all orders, consents and approvals necessary to consummate the transactions contemplated by this Agreement, including without limitation, the Approval Order and (ii) obtain all necessary waivers, consents and approvals from Governmental Authorities and make all necessary registrations and filings and the taking of all reasonable steps as may be necessary to obtain any approval or waiver from, or to avoid any action or proceeding by, any Governmental Authority.

Section 8.4 Sale Procedures. The Seller (a) will conduct the auction process in accordance with the Sale Procedures Order and (b) will not amend, waive, modify or supplement in any material respect the Sale Procedures except as set forth herein or therein or as required or ordered by the Bankruptcy Court.

Section 8.5 Public Disclosure. Except as otherwise required by law or regulation, as contemplated by the Sale Procedures Order or as may be necessary or appropriate in connection with the pending Chapter 11 Case, each Party shall consult with the other Party and obtain such other Party's consent, which consent shall not be unreasonably withheld, before issuing any press release or otherwise making any public statements with respect to this Agreement or the matters contained herein and will not issue any such press release or make any such statement prior to such consultation and agreement.

Section 8.6 Apportionment. All real property and personal property Taxes, assessments and similar governmental charges levied with respect to the Acquired Assets for a taxable period which includes (but does not end on) the Closing Date shall be apportioned between the Pre-Closing Period and the Post-Closing Period as of the Closing Date on a per diem basis. On or prior to the Closing Date, the Seller shall pay an estimate of all real property and personal property Taxes, assessments and similar charges to be levied with respect to the Acquired Assets for the Pre-Closing Period to the appropriate Tax authority. Thereafter, the Seller shall notify the Purchaser upon receipt of any bill for real or personal property Taxes or similar charges relating to the Acquired Assets, part or all of which are attributable to any Post- Closing Period, and shall promptly deliver such Tax bill to the Purchaser who shall pay the same to the appropriate governmental authority; provided, that if such bill covers the Pre-Closing Period, the Seller shall also remit to the Purchaser, prior to the due date of such Tax bill, payment for the proportionate amount of such bill that is attributable to the Pre-Closing Period. If either the Seller or the Purchaser

shall make a payment for which such Party is entitled to have such payment made by the other Party under this Section, the other Party shall make reimbursement promptly but in no event later than fifteen (15) Business Days after the presentation of a statement setting forth the amount of reimbursement to which the presenting Party is entitled along with such supporting evidence as is reasonably necessary to calculate the amount of reimbursement. Any payment between the Parties required under this Section 8.6 shall bear interest at the rate per annum determined, from time to time, under the provisions of Section 6621(a)(2) of the Code for each day from the date the relevant Tax is due to be paid to the Tax authority until paid. The Purchaser and the Seller shall cooperate with each other and shall use commercially reasonable efforts to assist the other Party to obtain any and all available tax refunds and rebates. The Seller shall tum over and pay to the Purchaser any portion of any refund or rebate that is attributable to the Post-Closing Period, and the Purchaser shall tum over and pay to the Seller any refund or rebate that is attributable to the Pre-Closing Period. Any refund or rebate that cannot be attributable to either the Pre-Closing Period or the Post-Closing Period shall be pro-rated over the respective periods in accordance with the amount of taxes paid in such periods. The Seller hereby directs that any refunds or rebates to which it would be entitled be paid to Lender, which holds a perfected first priority security interest in the Seller's interest in such refunds and rebates.

Section 8.7 Access to Records and Certain Personnel. During the Pre-Closing Period, the Seller shall permit the Purchaser and any successors or assigns, its counsel, tax advisors and other Affiliates reasonable access to (i) the financial and other books and records

relating to the Business (whether in documentary or data form) during the Pre-Closing Period, (ii) the Seller's employees and (iii) the Leased Property for any purpose relating to the operation, winding down, liquidation and final administration of the Business or the bankruptcy estate, which access shall include (A) the right of such professionals to copy and use such documents and records as they may reasonably request, and (B) the Purchaser's copying and delivering to the Seller or its professionals (at the Seller's expense) such documents or records as they may reasonably request.

Section 8.8 Employees; Employee Benefits.

(a) Agreements Regarding Employees. The Purchaser may offer employment to some or all of the Seller's employees commencing as of the Closing Date. Employees who accept employment with the Purchaser shall be referred to hereinafter as "**Transferred Employees.**" The Purchaser shall not assume any Liability for any accrued and unused paid time off earned by any Transferred Employees in connection with their employment by the Seller.

(b) Other Obligations. The Seller and the Purchaser agree to cooperate reasonably concerning all matters relating to the Transferred Employees, including, without limitation, the Seller's permitting the Purchaser to speak with, consult and otherwise interview any of the Seller's employees prior to the Closing.

(c) WARN. Prior to the Closing Date, the Seller shall terminate all of the Transferred Employees and assume any and all obligations and notice requirements, if any, under the Worker Adjustment and Retraining Notification Act and analogous provisions of state law (collectively, "**WARN**") with regard to such Transferred Employees to the extent WARN applies. While the

Purchaser intends to offer employment to some or all of Seller's employees, the Purchaser shall have no obligation to offer employment to any employee of Seller. The Purchaser shall have no obligation whatsoever to any person currently or previously employed or affiliated in any manner with the Seller unless such person is employed by the Purchaser after the Closing Date. In no event shall the Purchaser be liable for any compensation, retirement or benefit plan established by the Seller and payable to any person currently or previously employed by the Seller (including any Transferred Employees).

Section 8.9 Cooperation.

(a) The Seller covenants and agrees that, during the period between the date hereof and the Closing, the Seller shall promptly inform the Purchaser in writing of any breaches of the representations and warranties contained in Article VI or any breach of any covenant of the Seller.

(b) The Purchaser covenants and agrees that, during the period between the date hereof and the Closing, the Purchaser shall promptly inform the Seller in writing of any breaches of the representations and warranties contained in Article VII or any breach of any covenant of the Purchaser.

Section 8.10 [Intentionally omitted]

Section 8.11 Bankruptcy Case. The Purchaser will cooperate fully with the Bankruptcy Court and with the Seller to expedite the Bankruptcy Case and to obtain orders as described in Article V.

Section 8.12 Assignment of Claims. In the event that the Purchaser elects to pay or otherwise satisfy any of the Excluded Liabilities, the Purchaser agrees

that it will not, by assignment, subrogation or otherwise, succeed to the rights of the Person holding such Excluded Liability, nor assert (nor permit any other Person to assert) any claim against the Seller or the Seller's bankruptcy estate for any such Excluded Liability.

Section 8.13 [Intentionally omitted]

Section 8.14 [Intentionally omitted]

Section 8.15 Seller's Employee Plans. In the event that the Purchaser, in its discretion, elects to assume any of the Seller's Employee Plans, the Purchaser shall provide notice to the Seller within at least three (3) Business Days of the Closing Date and the Seller agrees to use its best efforts to assist with the transfer of the Seller's Employee Plans on the Closing Date, at the Purchaser's expense.

ARTICLE IX

CONDITIONS TO THE OBLIGATIONS OF THE PURCHASER

Section 9.1 Closing Conditions to the Purchaser's Obligations. The obligations of the Purchaser to consummate the Closing are conditioned upon the satisfaction or waiver in writing (subject to applicable Law), on or prior to the Closing Date (or such earlier date as is specified), of the following conditions:

(a) Representations and Warranties. The representations and warranties of the Seller contained in Article VI and any representations and warranties of the Seller set forth in the Ancillary Agreements qualified by materiality shall be true and correct in all respects, except for such exceptions as are permitted by this

Agreement, without further qualification as of the date hereof and the Closing Date, as if made on such date (except for such representations and warranties that relate to a specific date, which shall be true and correct in all respects as of such date), and all representations and warranties of the Seller contained in Article VI and any representations and warranties of the Seller set forth in the Ancillary Agreements that are not so qualified shall be true and correct in all material respects as of the Closing Date, as if made on such date (except for such representations and warranties that relate to a specific date, which shall be true and correct in all material respects as of such date). The Seller shall have delivered to the Purchaser a certificate, dated as of the Closing Date and signed by the Seller's President, Chief Restructuring Officer or other authorized officer of the Seller (the "**Seller Closing Certificate**"), confirming that the conditions set forth in this Section 9.1(a) have been satisfied.

(b) Performance of Agreements. Each and all of the agreements of the Seller to be performed on or prior to the Closing pursuant to the terms hereof and the Ancillary Agreements shall have been duly performed in all respects, and the Seller Closing Certificate shall confirm that the conditions set forth in this Section 9.1(b) have been satisfied.

(c) Closing Deliverables. The Purchaser shall have received the documents required to be delivered by the Seller to the Purchaser pursuant to Section 4.2.

(d) No In junction. No court or other Governmental Authority of competent jurisdiction shall have issued an order or stay pending appeal which shall then be in effect restraining or prohibiting the completion of the transactions contemplated hereby.

(e) Statutes. No Law of any kind shall have been enacted, entered, promulgated or enforced by any Governmental Authority which prohibits, or has the effect of making illegal, the consummation of the transactions contemplated hereby and shall remain in effect.

(f) Governmental Approvals. All governmental and other consents and approvals necessary to permit the consummation of the transactions contemplated by this Agreement shall have been received.

(g) Bankruptcy Matters. The Sale Procedure Order and Approval Order shall have been entered by the Bankruptcy Court in substantially the form attached to this Agreement, including the unqualified right of the Lender to satisfy the Purchase Price by credit bid in accordance with section 363(k) of the Bankruptcy Code, and no notice of appeal from the Approval Order shall have been filed on or before the Closing.

(h) No Material Adverse Effect. During the period from the date hereof to the Closing Date, there shall not have been any occurrence, or any occurrences which, when taken together in the aggregate, would reasonably be expected to constitute a Material Adverse Effect.

(i) Employment. Neither Richard Ferdinand nor Kevin McCarthy shall have died or become permanently disabled on or before the Closing Date.

(j) [Omitted].

(k) Offer Letters. Prior to Closing, Richard Ferdinand and Kevin McCarthy shall have executed employment offer letters from the Purchaser in a form acceptable to the Purchaser (the **"Offer Letters"**). This condition shall be deemed satisfied unless the Purchaser notifies the Seller in writing on or before 11:59 p.m.

on or before three Business Days before the scheduled Closing that it has not been satisfied and that the Purchaser is terminating this Agreement for failure of this condition. For purposes of this subparagraph (k), the Purchaser's written notice may be delivered by electronic mail to Daniel W. Sklar, Esq. at DSklar@nixonpeabody.com.

ARTICLE X

CONDITIONS TO THE OBLIGATIONS OF THE SELLER

Section 10.1. Conditions to the Seller's Obligations. The obligations of the Seller to consummate the Closing are conditioned upon the satisfaction or waiver in writing (subject to applicable Law), on or prior to the Closing Date, of the following conditions:

(a) Representations and Warranties. The representations and warranties of the Purchaser contained in Article VII (and any representations and warranties of the Purchaser set forth in the Ancillary Agreements) qualified by materiality shall be true and correct in all respects, except for such exceptions as are permitted by this Agreement, without further qualification as of the Closing Date, as if made on such date (except for such representations and warranties that relate to a specific date, which shall be true and correct in all respects as of such date), and all representations and warranties of the Purchaser contained in Article VII (and any representations and warranties of the Purchaser set forth in the Ancillary Agreements) that are not so qualified shall be true and correct in all material respects as of the Closing Date, as if made on such date (except for such representations and warranties that relate to a specific date, which shall be true and correct

ir. all material respects as of such date) with only such exceptions as are permitted by this Agreement or which, individually or in the aggregate, would not prevent, interfere or delay the Purchaser from performing its obligations under this Agreement or the consummation of the transactions contemplated by this Agreement. The Purchaser shall have delivered to the Seller a certificate, dated as of the Closing Date and signed by the Purchaser's Manager or other duly authorized officer (the "**Purchaser Closing Certificate**"), confirming that the conditions set forth in this Section 10.1(a) have been satisfied.

(b) Performance of Agreements. Each and all of the agreements of the Purchaser to be performed on or prior to the Closing pursuant to the terms hereof and the Ancillary Agreements shall have been duly performed in all respects, and the Purchaser Closing Certificate shall confirm that the conditions set forth in this Section 10.1(b) have been satisfied.

(c) [Omitted.]

(d) Payment of Purchase Price. The Purchaser shall have paid to the Seller the Purchase Price in accordance with Section 3.1(a).

(e) No Injunction. No court or other Governmental Authority of competent jurisdiction shall have issued an order or stay pending appeal which shall then be in effect restraining or prohibiting the completion of the transactions contemplated hereby.

(f) Statutes. No Law of any kind shall have been enacted, entered, promulgated or enforced by any Governmental Authority which prohibits, or has the effect of making illegal, the consummation of the transactions contemplated hereby and shall remain in effect.

(g) Governmental Approvals. All material governmental and other material consents and approvals necessary to permit the consummation of the transactions contemplated by this Agreement shall have been received.

(h) Bankruptcy Matters. The Sale Procedure Order and Approval Order shall have been entered by the Bankruptcy Court in substantially the form attached to this Agreement, and no notice of appeal from the Approval Order shall have been filed on or before the Closing.

ARTICLE XI

TERMINATION

Section 11.1 Events of Termination. This Agreement may be terminated and the transactions contemplated hereby may be abandoned at any time prior to the Closing:

(a) by mutual written consent of the Parties;

(b) by either Party, if the Closing Date shall not have occurred by November 20, 2015; provided, that the right to terminate this Agreement under this Section 11.1(b) shall not be available to any Party whose failure to fulfill any obligation under this Agreement shall be the cause of the failure of the Closing Date to occur on or before such date;

(c) by the Seller if (i) there shall have been a material breach on the part of the Purchaser of any of its representations, warranties or covenants such that the conditions set forth in Section 10.1(a) or Section 10.1(b) would not be satisfied as of the time of such breach, (ii) the Seller shall have given written notice of such

breach to the Purchaser, (iii) at least two (2) Business Days shall have elapsed since the delivery of such written notice to the Purchaser and (iv) such breach shall not have been cured in all material respects; provided that the Seller may not terminate this Agreement pursuant to this Section 11.1(c) if it shall have materially breached this Agreement and such breach has not been duly cured;

(d) by the Purchaser if (i) there shall have been a material breach on the part of the Seller of any of its representations, warranties or covenants such that the conditions set forth in Section 9.l(a) or Section 9.l(b) would not be satisfied as of the time of such breach, (ii) the Purchaser shall have given written notice of such breach to the Seller, (iii) at least two (2) Business Days shall have elapsed since the delivery of such written notice to the Seller and (iv) such breach shall not have been cured in all material respects; provided that the Purchaser may not terminate this Agreement pursuant to this Section 11.1(d) if it shall have materially breached this Agreement and such breach has not been duly cured;

(e) by any Party, if there shall be any Law of any Governmental Authority that makes consummation of the transactions contemplated hereby illegal or otherwise prohibited or if any judgment, injunction, order or decree of any competent authority prohibiting such transactions is entered and such judgment, injunction, order or decree shall have become final and non-appealable;

(f) by either Party if (i) the Sale Procedure Order is not issued by the Bankruptcy Court on or before September 21, 2015 or in the event that a stay pending appeal or a writ of mandate of the Approval Order is

granted on behalf of any party; or (ii) the Lender refuses to close the transactions contemplated by this Agreement or withdraws its consent to the transactions contemplated by this Agreement;

(g) by either Party if the Approval Order in form and substance that is in accordance with the provisions of this Agreement is not issued by the Bankruptcy Court in time to permit the Closing to occur on or before November 20, 2015; or

(h) by any Party, if an Alternative Transaction is approved by the Bankruptcy Court.

If either Party wishes to terminate this Agreement pursuant to this Section 11.1, such Party will deliver to the other Party a written termination notification stating that such Party is terminating this Agreement and setting forth a brief statement of the basis on which such Party is terminating this Agreement.

Section 11.2 Effect of Termination. Except as otherwise provided in this Section 11.2, in the event that this Agreement shall be terminated pursuant to Section 11.1, all further obligations of the Parties under this Agreement shall terminate without further Liability or obligation of any Party to any other Party hereunder, provided, however, that (i) Sections 3.2, 5.2, 8.5, 11.2, 12.1, 12.3, 12.4, 12.6 and 12.22 shall survive the termination of this Agreement; (ii) the Parties will remain bound by the provisions of the Confidentiality Agreement; and (iii) no Party shall be released from Liability hereunder if this Agreement is terminated and the transactions abandoned by reason of (A) failure of such Party to have performed its obligations hereunder in any respect or (B) any willful misconduct, fraud or intentional misrepresentation made by such Party of any matter set forth herein.

ARTICLE XII

MISCELLANEOUS

Section 12.1 Expenses; Fees. Except as otherwise set forth in this Agreement, the Parties shall pay all of their own expenses relating to the transactions contemplated by this Agreement.

Section 12.2 Transfer Taxes. The Parties recognize and acknowledge that the sale, transfer, assignment and delivery of the Acquired Assets may be exempt under Section 1146(c) of the Bankruptcy Code and the Approval Order from all state and local transfer, recording, stamp or other similar transfer Taxes that may be imposed by reason of the sale, transfer, assignment and delivery of the Acquired Assets. The Seller on the one hand and the Purchaser on the other hand shall each bear and pay one-half of any transfer Taxes that may become payable in connection with the sale of the Acquired Assets to the Purchaser, the assumption by the Purchaser of the Assumed Liabilities or any of the other transactions contemplated by this Agreement or the Ancillary Agreements (the "**Charges**"). The Seller and the Purchaser agree to use their commercially reasonable efforts to minimize, and to cooperate with and assist the other in, minimizing the Charges. For the avoidance of doubt, any broker's or finder's fees of Seller, including the fee set forth on Schedule 12.23 shall not be deemed a Charge and shall be paid in full by the Seller.

Section 12.3 APPLICABLE LAW. THIS AGREEMENT IS TO BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH U.S. FEDERAL BANKRUPTCY LAW, TO THE EXTENT APPLICABLE, AND WHERE STATE LAW IS IMPLICATED, THE LAWS OF THE STATE OF

NEW HAMPSHIRE SHALL GOVERN, WITHOUT REFERENCE TO CHOICE OF LAW PRINCIPLES, INCLUDING ALL MATTERS OF CONSTRUCTION, VALIDITY AND PERFORMANCE.

Section 12.4 JURISDICTION; WAIVER OF JURY TRIAL. THE BANKRUPTCY COURT WILL HAVE JURISDICTION OVER ANY AND ALL DISPUTES BETWEEN OR AMONG THE PARTIES, WHETHER IN LAW OR EQUITY, ARISING OUT OF OR RELATING TO THIS AGREEMENT OR ANY AGREEMENT CONTEMPLATED HEREBY; PROVIDED, THAT IF THE BANKRUPTCY COURT IS UNWILLING OR UNABLE TO HEAR ANY SUCH DISPUTE, THE COURTS OF THE STATE OF NEW HAMPSHIRE AND THE FEDERAL COURTS OF THE UNITED STATES OF AMERICA LOCATED IN THE STATE OF NEW HAMPSHIRE WILL HAVE SOLE JURISDICTION OVER ANY AND ALL DISPUTES BETWEEN OR AMONG THE PARTIES, WHETHER IN LAW OR EQUITY, ARISING OUT OF OR RELATING TO THIS AGREEMENT OR ANY AGREEMENT CONTEMPLATED HEREBY. EACH OF THE PARTIES HERETO HEREBY IRREVOCABLY CONSENTS AND SUBMITS TO THE JURISDICTION OF SUCH COURTS AND WAIVES ANY AND ALL RIGHT TO TRIAL BY JURY IN ANY LEGAL PROCEEDING ARISING OUT OF OR RELATED TO THIS AGREEMENT OR THE TRANSACTIONS CONTEMPLATED HEREBY.

Section 12.5 Captions; Headings; Table of Contents. The Article and Section captions and the headings and table of contents set forth herein are for reference purposes only, and shall not in any way affect the meaning or interpretation of this Agreement.

Section 12.6 Notices. All notices, requests, demands, waivers and other communications required or permitted to be given under this Agreement shall be in writing and shall be deemed to have been duly given if delivered in person or mailed, certified or registered mail with postage prepaid, or sent by telex, telegram or telecopy and a confirmation of transmission is obtained, as follows:

(a) if to the Seller, to:

Tempnology LLC
210 Commerce Way, Suite 100
Portsmouth, NH 03801
Attention: Kevin McCarthy, President

with a copy to:

Nixon Peabody LLP
900 Elm Street
Manchester, NH 03101
Facsimile: 866-947-0745
Attention: Daniel W. Sklar, Esq.

(b) if to the Purchaser, to:

Schleicher & Stebbins Hotels, L.L.C.
1359 Hooksett Road
Hooksett, NH 03106
Attention: Mark Stebbins, Manager

with a copy to:

Sheehan Phinney Bass & Green P.A
1000 Elm Street
Manchester, NH 03101
Facsimile: (603) 641-8768
Attention: Christopher M. Candon, Esq.

or to such other Person or address as any Party shall specify by notice in writing to each of the other

Parties. All such notices, requests, demands, waivers and communications shall be deemed to have been received on the date of delivery unless if mailed by registered or certified mail, postage prepaid, in which case on the third Business Day after the mailing thereof except for a notice of a change of address, which shall be effective only upon receipt thereof.

Section 12.7 Assignment; Parties in Interest. This Agreement may not be transferred, assigned, pledged or hypothecated by the Seller (whether voluntarily, involuntarily, by way of merger or otherwise) to any other Person without the prior written consent of the Purchaser. This Agreement may be transferred or assigned by the Purchaser to any Affiliate of the Purchaser without the consent of the Seller, provided however that the Purchaser shall remain fully liable for the obligations of the Purchaser under this Agreement. This Agreement shall be binding upon and shall inure to the benefit of the Parties and their respective successors and permitted assigns.

Section 12.8 Counterparts. This Agreement may be executed in two (2) or more counterparts, in original form or by facsimile, each of which shall be deemed an original, but all of which together will constitute one and the same document.

Section 12.9 Entire Agreement. This Agreement, including the exhibits, schedules and other documents referred to herein which form a part hereof, and the Confidentiality Agreement, contains the entire understanding of the Parties with respect to the subject matter contained herein and therein. This Agreement supersedes all prior agreements and understandings between the Parties with respect to such subject matter.

Section 12.10 Severability; Enforcement. The invalidity of any portion hereof shall not affect the validity, force or effect of the remaining portions hereof. If it is ever held that any restriction hereunder is too broad to permit enforcement of such restriction to its fullest extent, each Party agrees that a court of competent jurisdiction may enforce such restriction to the maximum extent permitted by Law, and each Party hereby consents and agrees that such scope may be judicially modified accordingly in any proceeding brought to enforce such restriction.

Section 12.11 Amendments; Waiver. This Agreement may not be changed orally, but only by an agreement in writing signed by all Parties. Any provision of this Agreement can be waived, amended, supplemented or modified by written agreement of the Parties. The failure of any Party to enforce at any time any of the provisions of this Agreement shall in no way be construed to be a waiver of any such provision, nor in any way to affect the validity of this Agreement or any part hereof or the right of such Party thereafter to enforce each and every such provision. No waiver of any breach of or non-compliance with this Agreement shall be held to be a waiver of any other or subsequent breach or non-compliance.

Section 12.12 No Strict Construction. The Parties hereto have participated jointly in the negotiation and drafting of this Agreement. In the event any ambiguity or question of intent or interpretation arises, this Agreement shall be construed as if drafted jointly by all Parties hereto, and no presumption or burden of proof shall arise favoring or disfavoring any Party by virtue of the authorship of any provision of this Agreement.

Section 12.13 Pronouns. As used herein, all pronouns shall include the masculine, feminine, neuter, singular and plural thereof whenever the context and facts require such construction.

Section 12.14 No Third Party Beneficiaries. Nothing express or implied in this Agreement is intended to confer, nor shall anything herein confer, upon any Person other than the Parties and the respective successors or assigns of the Parties, any rights, remedies, obligations or Liabilities whatsoever.

Section 12.15 Interpretation. This Agreement has been negotiated between the Parties and will not be deemed to be drafted by, or the product of, any party. As such, this Agreement will not be interpreted in favor of, or against, any party.

Section 12.16 No Joint Venture. No Party hereto shall make any warranties or representations, or assume or create any obligations, on the other Party' s behalf except as may be expressly permitted hereunder or in writing by such other Party. Each Party shall be solely responsible for the actions of all its respective employees, agents and representatives.

Section 12.17 Specific Performance. The transactions contemplated by this Agreement are unique transactions and any failure on the part of either Party to complete the transactions contemplated by this Agreement or any of the Ancillary Agreements on the terms of this Agreement or any of the Ancillary Agreements will not be fully compensable in damages and the breach or threatened breach of the provisions of this Agreement or any of the Ancillary Agreements would cause the non-breaching Party irreparable harm. Accordingly, in addition to and not in limitation of any other remedies available to the non-breaching Party for

a breach or threatened breach of this Agreement or any of the Ancillary Agreements, such Party will be entitled to specific performance of this Agreement or any of the Ancillary Agreements upon any breach by the other Party, and to an injunction restraining any such party from such breach or threatened breach.

Section 12.18 No Other Representations. The Parties acknowledge that, except as expressly set forth in this Agreement or the Ancillary Agreements, neither Party has made or is making any representations or warranties whatsoever to the other, implied or otherwise.

Section 12.19 Access of Seller to Books and Records. At all times after the Closing Date, Purchaser will give Seller and Seller's advisors and representatives reasonable access to any books and records of Seller that are included in the Acquired Assets (to the extent such books and records relate to any period prior to the Closing Date).

Section 12.20 Survival of Representations and Warranties. None of Seller's representations, warranties and pre-closing covenants contained in this Agreement, the Ancillary Agreements, the Seller Closing Certificate or in any other agreement, document or certificate delivered pursuant to this Agreement shall survive the Closing. None of Purchaser's representations, warranties and pre-closing covenants contained in this Agreement, the Ancillary Agreements, the Purchaser Closing Certificate or in any other agreement, document or certificate delivered pursuant to this Agreement shall survive the Closing.

Section 12.21 Entire Agreement. This Agreement and the Ancillary Agreements set forth the entire understanding of the Parties and supersede all other

agreements and understandings between the Parties relating to the subject matter hereof and thereof.

Section 12.22 Confidentiality. On and at all times from the date hereof, the Parties shall remain subject to that certain Non-Disclosure Agreement by and between the Parties dated August 12, 2015.

Section 12.23 Broker's or Finder's Fees. Except as set forth on Schedule 12.23, no agent, broker, Person or firm is, or will be, entitled to any commission or broker's or finder's fees from any Party, or from any Affiliate of any Party, in connection with any of the transactions contemplated by this Agreement based upon arrangements made by or on behalf of the Seller.

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IN WITNESS WHEREOF, each of the Parties has caused this Agreement to be executed by its officers thereunto duly authorized, all as of the day and year first above written.

Tempnology, LLC

By: _____
Name:
Title:

Schleicher & Stebbins Hotels, L.L.C.

By: _____
Name: Mark Stebbins
Title: Manager

Exhibit 2.1

ACQUIRED ASSETS

The Acquired Assets shall include any and all interests of the Seller in the following:

(a) All securities in entities other than the Seller owned by the Seller, and of Seller's interest in Granite Textile, Ltd.

(b) all personal property and interests therein, including, without limitation, vehicles, machinery, equipment, furniture, office equipment, molds, patterns and dies, tools, fixtures and other tangible property of any kind or nature;

(c) all general intangibles and, to the extent not otherwise constituting general intangibles, any interest of the Seller in any and all claims by the Seller against any other person, contingent or otherwise, known or unknown, including, without limitation, all rights under express or implied warranties from suppliers, claims for collection or indemnity, and choses in action other than choses in action relating to Excluded Assets other than choses in action relating to Excluded Assets described in items (a) through (h) and (i) of Exhibit 2.2;

(d) all rights and interests, but no Liabilities or other obligations other than the Assumed Liabilities;

(e) all Assigned Permits;

(f) all Intellectual Property;

(g) except as set forth in subsection (d) of **Exhibit 2.2**, all books, records, files and papers, whether in hard copy or computer format, including, without limitation, all materials, manuals, sales and promotional materials and records, advertising materials, customer lists, sup-

plier lists, mailing lists, distribution lists, business plans, litigation files, credit information, cost and pricing information, blueprints for tools, machines and machine components, and all documents embodying the Intellectual Property, in each case relating to the Acquired Assets, excluding records which are attorney-client privileged or considered attorney work product;

(h) any telephone and facsimile numbers, e-mail addresses and post office boxes;

(i) all insurance benefits, including rights and proceeds, and similar items, arising from or relating to the Acquired Assets prior to the Closing Date;

;

(j) any or all of the Seller's Employee Plans that the Purchaser elects to assume at the Closing pursuant to Section 8.15;

(k) all Leased Property; and

(l) the specific property listed in the attachment to this **Exhibit 2.1**, including Assigned Contracts so listed, and Assigned Contracts added to this **Exhibit 2.1** pursuant to Section 2.1.

ATTACHMENT TO EXHIBIT 2.1

List of Assigned Contracts: All of the agreements listed on Schedule G of the Seller's Bankruptcy Schedules excluding those that are expressly rejected by the Seller at or prior to the Closing.

Intellectual Property: (see attached list)

ATTACHMENT TO EXHIBIT 2.1

ASSUMED CONTRACTS

Contract Date	Expiration Date	Counter Party	Address	Proposed Cure Amount
Jan 1, 2012		ADP Total Source	11 Northeastern Blvd, Salem, NH 03079	$0.00
Oct 1, 2014	Sept 30, 2015	Barrett Distribution Services	15 Freedom Way, Franklin, Ma 02038	$0.00
April 1, 2015	March 31, 2017	Jewett Commercial Park LLC	32 Harriman Hill Rd, Raymond , NH 03077	$0.00
Oct 10, 2014	Dec 31, 2016	Hohenstein Institute of America	1 688 Westbrook Ave, Burlington, NC 27215	$9,677.00
Pending	3 years	GECC	300 E John Carpenter Freeway, Irving, Tx 75062	$0.00
Aug 1, 2012	July 31, 2017	Muirfields LLC	c/o Kane Mgmt Group LLC, 210 Commerce Way #300, Portsmouth, NH 0280 I	$0.00
Feb 20, 2015	Jan 1, 2020	Fruit of the Loom	1 Fruit of the Loom Drive, Bowling Green, Kentucky 42103	$0.00
Feb 1, 2015	Jan 31, 2020	Disney Worldwide Services	DWS, 1675 Buena Vista Drive, Lake Buena Vista, Florida 32830	$156,250.00

Feb 1, 2015	Dec 31, 2017	Rope-A-Towel	PO Box 1052, Windemere Fla 34786	$0.00
July 1, 2015	Dec 31, 2016	MPW Sports Inc	21193 Gladiolos Way, Lake Forest, Ca 92630	$0.00
March 1, 2015		Perennial Sales	4963 Bacopa Lane S, #605, St Petersburg, Fla 3371.5	$0.00
May 15, 2014	Dec 31, 2016	Kittredge and Associates	63 Grand Ave, River Edge, NJ 07661	$0.00
July 1, 2015	Dec 31, 2019	Toshiya Sato	2-15-61 Inukura, Miyamae-Ku, Kawasaki, Kanagawa 216- 011, Japan	$0.00
June 1, 2015	May 31, 2017	Tony Fernandez	4 Bateson Drive, Andover, Ma 01810	$0.00
July 1, 2015	Dec 31, 2015	Prime Pacific Connections LLC	PO Box 15583, Irvine, Ca 92623	$0.00
June 19, 2015	Dec 31, 2015	Jim Zeiba	10 Applewood Drive, Derry, NH 03038	$0.00
March 1, 2015	Feb 28, 2016	Athena Apparel Solutions LLC	I 00 Albany St., Portsmouth, NH 03801	$0.00
June 3, 2011	June 3, 2016	Rob Westergren	8 West Ridge Dr., Hampton, NH 03842	$0.00

June 3, 2011	June 3, 2016	Dennis Ackroyd	810 Meadow Rd., Caso, Maine 04015	$0.00
Oct 1, 2014	Sept 30, 2019	PJS Distributors Pty Ltd	440 Collins St., Level 12, Melbourne, VIC 3000, Australia	$0.00
March 1, 2015	Feb 28, 2020	Sportsline	Unit 1504-05, 102 Austin Road, Tsinshatsui, Kowloon Hong Kong	$0.00
Nov 1, 2014	Oct 31, 2019	Unique Piertech Solutions Pvt Limited	Peninsula Techno Park, Equinox Building Park, Tower 1, 7m Fl OffBandra Kurla Rd., LBS Marg, Mumbai 400070 India	$0.00
Feb 1, 2015	Jan 31, 2018	Hae Min Trading Co	Haemin Bldg, 2F 23 Seokchon-housu-ro-18-gil, songpa-gu Seoul Korea	$0.00
July 1, 2015	June 30, 2019	Beattie Matheson Ltd	Level 2, 272 Parnell Rd, Parnell, Auckland 1052 New Zealand	$0.00
June 1, 2015	Dec 31, 2017	RON Corp	1-3-4 Shimomae, Toda City, Saitama 335-0016, Japan	$0.00
March 1, 2015	Feb 28, 2018	Metroasis (Country Life Ltd)	169-1, Sec 1, Kangle Road, Xinfeng Township, Hsinchu County 304 Taiwan	$0.00

Case Number	Case Type	Country	Priority Case Number	Status Filing Date, App. Serial No.	Pat/Reg No., Issue/Reg Date	Title	#
32D-001	US Patent	US	DDD-001PROV	Status: Issued Filed: 12/15/2008 Serial #: 12/334,682	Issue: 5/14/2013 Pat. #: 8,440,119 Expires 2/24/2031	Title: Fabric and Method of Making the Same	1
32D-00IDIV	US App	US	DDD-001PROV	Status: Pending Filed 4/19/2013 Serial # 13/866,294		Title: Fabric with cooling characteristics	2
32D-001DIV2	US App	US	DDD-001PROV	Status: Allowed Filed: 5/8/2013 Serial #: 13/889,466	Scheduled to issue 9/1/2015; Pat #: 9,121,642 (tentative)	Title: Method of cooling an object with a fabric	3
TEMP-002	US App	US	DDD-001PROV	Status: Pending Filed: 10/16/2012 Serial #: 13/653,216		Title: Fabric and Method of Making the Same (DR COOL)	7

Case Number	Case Type	Country	Priority Case Number	Status Filing Date, App. Serial No.	Pat/Reg No., Issue/Reg Date	Title	#
TEMP-002AU	Foreign App	Australia	TEMP-002	Status: Pending Filed: 5/4/2015 Serial #: 2013331379		Title: Fabric and Method of Making the Same	8
TEMP-002BR	Foreign App	Brazil	TEMP-002	Status: Pending Filed: 4/14/2015 Serial #: 1120150063293		Title: Fabric and Method of Making the Same	9
TEMP-002CA	Foreign App	Canada	TEMP-002	Status: Pending Filed: 4/14/2015 Serial #: 2888932		Title: Fabric and Method of Making the Same	10
TEMP-002CN	Foreign App	China	TEMP-002	Status: Pending Filed: 6/16/2015 Serial #: 201380065828.9		Title: Fabric and Method of Making the Same	11

Case Number	Case Type	Country	Priority Case Number	Status Filing Date, App. Serial No.	Pat/Reg No., Issue/Reg Date	Title	#
TEMP-002EP	Foreign App	EPO	TEMP-002	Status: Pending Filed: 5/1/2015 Serial #: 13846584.4		Title: Fabric and Method of Making the Same	12
TEMP-002IN	Foreign App	India	TEMP-002	Status: Pending Filed: 5/5/2015 Serial #: 1275/KOLNP/2015		Title: Fabric and Method of Making the Same	13
TEMP-002JP	Foreign App	Japan	TEMP-002	Status: Pending Filed: 4/15/2015 Serial #: 2015-537781		Title: Fabric and Method of Making the Same	14
TEMP-002KR	Foreign App	Korea, Republic of	TEMP-002	Status: Pending Filed: 5/11/2015 Serial #: 2015-7012256		Title: Fabric and Method of Making the Same	15

Case Number	Case Type	Country	Priority Case Number	Status Filing Date, App. Serial No.	Pat/Reg No., Issue/Reg Date	Title	#
TEMP-002PTC	PCT App	PCT	TEMP-002	Status: Done Filed: 10/15/2013 Serial #: PCT/US2013/065125		Title: Fabric and Method of Making the Same	16
TEMP-002RU	Foreign App	Russian Federation	TEMP-002	Status: Pending Filed: 5/15/2015 Serial #: 2015118384		Title: Fabric and Method of Making the Same	17
TEMP-002ZA	Foreign App	South Africa	TEMP-002	Status: Pending Filed: 4/15/2015 Serial #: 2015/02531		Title: Fabric and Method of Making the Same	18
TEMP-003PROV	US App	US		Status: Pending Filed: 10/14/2014 Serial #: 62/063,850		Title: Stretchable fabric and method of making the same	19

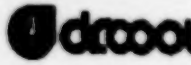
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TEMP-004PROV	US App	US		Status: Pending Filed: 10/14/2014 Serial #: 62/063,830		Title: Hybrid yarns, method of making hybrid yarns and fabric made of hybrid yarns	20

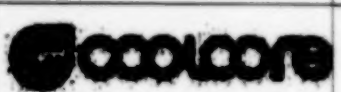
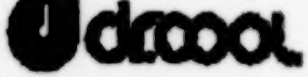
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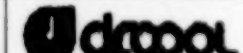
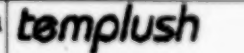
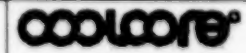
Foreign Trademark Summary Report

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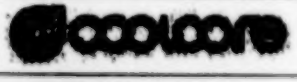
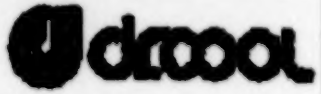
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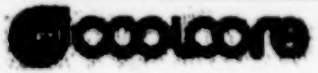
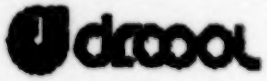
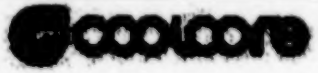
Case Number	Country	Mark	Trademark Image	Class	Filing Date Serial #	Reg Date Reg #	Status Renewal Due
TEM-AR-01	Argentina	COOLCORE	COOLCORE	024	7/1/2011 3,100,257		Pending
TEM-AR-02	Argentina	COOLCORE	COOLCORE	025	7/1/2011 3,100,258	11/2/2012 2,535,081	Registered *11/2/2022*
TEM-AR-03	Argentina	Dr. Cool plus Water Drop Design		010	6/24/2013 3257574	8/14/2014 2668529	Registered *8/14/2024*

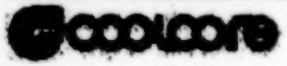
Case Number	Country	Mark	Trademark Image	Class	Filing Date Serial #	Reg Date Reg #	Status Renewal Due
TEM-AU-02	Australia	Dr. Cool by CoolCore (Stylized)		010	1/7/2013 1534495	1/7/2013 1534495	Registered *1/7/2023*
TEM-AU-03	Australia	COOLCORE plus Design		024 025	5/7/2013 1555797		Pending
TEM-BR-01	Brazil	COOLCORE	COOLCORE	024	6/28/2011 903787032		Pending
TEM-BR-02	Brazil	COOLCORE	COOLCORE	025	6/28/2011 903787032		Pending
TEM-BR-03	Brazil	Dr. Cool plus Water Drop Design		010	6/20/2013 840552963		Pending

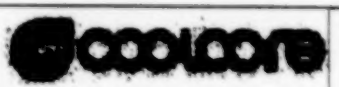
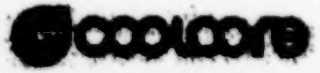
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TEM-CA-01	Canada	COOLCORE	COOLCORE	024 025	7/10/2012 1585182		Pending
TEM-CA-02	Canada	Dr. Cool plus Water Drop Design		010	6/21/2013 1632191	10/6/2014 887,480	Registered *10/6/2029*
TEM-CA-03	Canada	templush plus Design		024	4/16/2014 1,673,059		Pending
TEM-CH-02	China	COOLCORE plus Design		024	12/19/2012 11915046		Pending
TEM-CH-03	China	COOLCORE plus Design		025	12/19/2012 11915045	4/13/2015 11915045	Registered *4/13/2025*

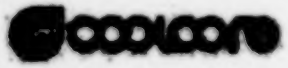
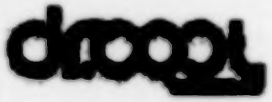
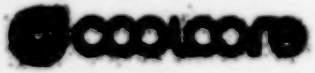
Case Number	Country	Mark	Trademark Image	Class	Filing Date Serial #	Reg Date Reg #	Status Renewal Due
TEM-CH-04	China	COOLCORE (word mark)	COOLCORE	024	12/19/2012 11915044		Pending
TEM-CH-06	China	COOLCORE in Chinese	酷儿酷	024	12/19/2012 11915042		Pending
TEM-CH-07	China	COOLCORE in Chinese	酷儿酷	025	12/19/2012 11915041		Pending
TEM-CH-08	China	Dr. Cool By CoolCore (Stylized)	[redacted]	010	1/9/2013 12018019	6/28/2014 12018019	Registered *6/27/2024*

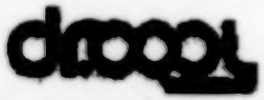
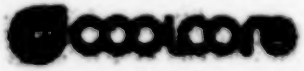
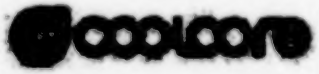
Case Number	Country	Mark	Trademark Image	Class	Filing Date Serial #	Reg Date Reg #	Status Renewal Due
TEM-CH-09	China	Coolcore (chemical free-cooling)	COOLCORE	025	3/31/2015 TBA		Pending
TEM-CHL-01	Chile	COOLCORE	COOLCORE	024	9/21/2011 970782	2/8/2013 992896	Registered *2/8/2023*
TEM-CHL-02	Chile	COOLCORE		025	9/21/2011 970783	7/12/2013 1022319	Registered *7/12/2023*
TEM-CHL-03	Chile	Dr. Cool plus Water Drop Design		024 025	6/3/2013 1060692		Pending
TEM-CHL-04	Chile	Dr. Cool plus Water Drop Design		010	6/20/2013 1063467		Pending

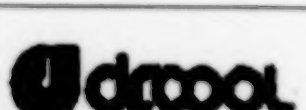
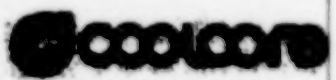
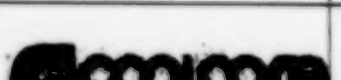
Case Number	Country	Mark	Trademark Image	Class	Filing Date Serial #	Reg Date Reg #	Status Renewal Due
TEM-COL-01	Columbia	COOLCORE plus Water Drop Logo		024 025	5/30/2013 2013-132632		Pending
TEM-COL-02	Columbia	Dr. Cool plus Water Drop Design		010	6/20/2013 13-147022		Pending
TEM-CR-01	Costa Rica	COOLCORE plus Water Drop Logo		024 025	5/30/2013 2013-005437	2/25/2014 233875	Registered *2/25/2024*

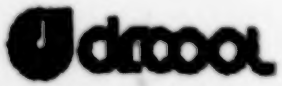
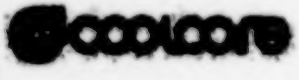
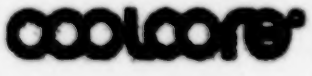
Case Number	Country	Mark	Trademark Image	Class	Filing Date Serial #	Reg Date Reg #	Status Renewal Due
TEM-CR-02	Costa Rica	Dr. Cool plus Water Drop Design		010	6/20/2013 2013-005437	2/24/2014 233863	Registered *2/24/2024*
TEM-CTM-03	CTM	COOLCORE plus Water Drop Logo		010 024	5/7/2013 11796539	12/11/2014 11796539	Registered *5/7/2023*
TEM-CTM-04	CTM	Dr. Cool plus Water Drop Design		010	6/20/2013 11917176	10/30/2013 11917176	Registered *6/20/2023*
TEM-CTM-05	CTM	Dr. Cool plus Water Drop Logo		035	10/10/2014 13345947	5/7/2015 13345947	Registered *10/10/204*

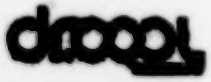
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TEM-EC-01	Ecuador	COOLCORE plus Water Drop Logo		024	5/30/2013 2013-40834	2/28/2014 2953-14	Registered *2/18/2024*
TEM-EC-02	Ecuador	COOLCORE plus Water Drop Logo		025	5/30/2013 2013-40832	2/18/2014 2952-14	Registered *2/18/2024*
TEM-EC-03	Ecuador	Dr. Cool plus Water Drop Design		010	6/20/2013 2013-42052-??	2/25/2014 4416-14	Registered *2/25/2024*

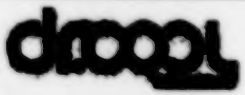
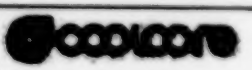
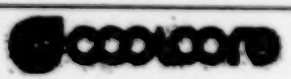
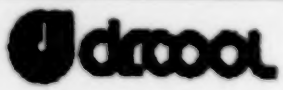
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TEM-FR-01	France	Coolcore plus Water Drop Logo		025	3/19/2015 15/4166215		Pending
TEM-HK-01	Hong Kong	Dr. Cool by CoolCore (Stylized)		010	1/7/2013 302487268	1/7/2013 302487268	Registered *1/6/2023*
TEM-HK-02	Hong Kong	COOLCORE plus Design		024 025	5/7/2013 302599787		Pending
TEM-HK-03	Hong Kong	COOLCORE (Stylized)		024 025	4/2/2013 302565414	4/2/2013 302565414	Registered *4/2/2023*

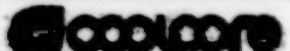
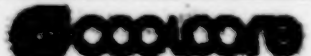
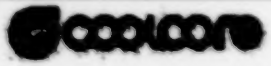
Case Number	Country	Mark	Trademark Image	Class	Filing Date Serial #	Reg Date Reg #	Status Renewal Due
TEM-ID-01	Indonesia	Dr. Cool By CoolCore (Stylized)		010	2/21/2013 D00 2013 008067		Pending
TEM-ID-02	Indonesia	COOLCORE plus Design		024 025	5/31/2013 D00 2013 026155		Pending
TEM-IN-01	India	COOLCORE plus Design		024 025	5/15/2013 2531798		Pending
TEM-IN-02	India	COOLCORE	COOLCORE	024	11/14/2013 2627556		Pending

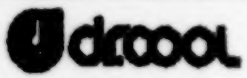
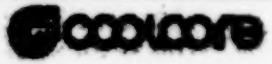
Case Number	Country	Mark	Trademark Image	Class	Filing Date Serial #	Reg Date Reg #	Status Renewal Due
TEM-IN-03	India	dr. cool plus Water Drop Logo		010	11/14/2013 2627555		Pending
TEM-IN-04	India	COOLCORE plus Water Drop Logo		025	11/14/2013 2627557		Pending
TEM-IN-05	India	COOLKNIT		024	4/21/2015 2947938		Pending
TEM-IS-01	Israel	COOLCORE plus Design		024 025	11/14/2012 250,911	11/14/2012 250,911	Registered *11/14/2022*

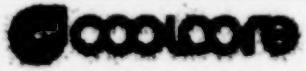
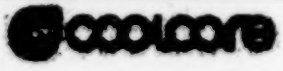
Case Number	Country	Mark	Trademark Image	Class	Filing Date Serial #	Reg Date Reg #	Status Renewal Due
TEM-IS-02	Israel	Dr. Cool plus Water Drop Design		010	6/23/2013 256,753		Pending
TEM-IT-01	Italy	Coolcore plus Water Drop Logo		025	3/11/2015 302015000008307		Pending
TEM-JA-02	Japan	COOLCORE	COOLCORE	024 025	7/23/2012 2012-059150	12/20/2013 5638667	Registered *3/28/2024*
TEM-JA-03	Japan	COOLCORE plus Design		024 025	12/7/2012 2012-099445	12/20/2013 5638667	Registered *12/20/2023*

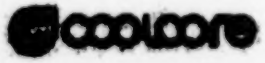
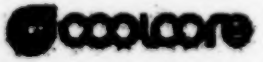
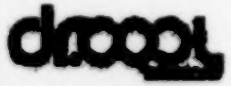
Case Number	Country	Mark	Trademark Image	Class	Filing Date Serial #	Reg Date Reg #	Status Renewal Due
TEM-JA-04	Japan	Dr. Cool By CoolCore (Stylized)		005 010	1/9/2013 2013-000849	10/11/2013 5622361	Registered *10/11/2023*
TEM-KO-01	Korea	COOLCORE	COOLCORE	024 025	6/27/2011 1 086 296	6/27/2011 1 086 296	Registered *6/27/2021*
TEM-KO-02	Korea	COOLCORE plus Design		024 025	11/16/2012 40-2012-71357	3/18/2014 40-1028129	Registered *3/18/2014*
TEM-KO-03	Korea	Dr. Cool plus Water Drop Logo		010 025	1/13/2015 40-2015-0002317		Pending

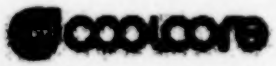
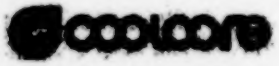
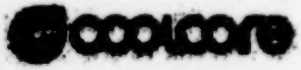
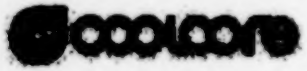
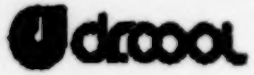
Case Number	Country	Mark	Trademark Image	Class	Filing Date Serial #	Reg Date Reg #	Status Renewal Due
TEM-MA-01	Malaysia	Dr. Cool By CoolCore (Stylized)		010	2/8/2013 2013051086		Pending
TEM-MA-02	Malaysia	COOLCORE plus Design		024	5/10/2013 2013054501		Pending
TEM-MA-08	Malaysia	COOLCORE plus Design		025	5/10/2013 2013054512		Pending
TEM-MC-01	Macau	Dr. Cool plus Water Drop Logo		010	4/20/2015 N/98506		Pending

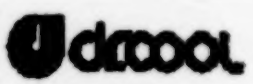
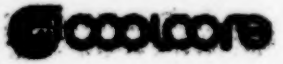
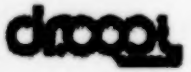
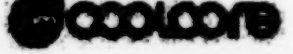
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TEM-MC-02	Macau	COOLCORE plus Water Drop Logo		025	4/20/2015 N/98507		Pending
TEM-MO-01	Morocco	COOLCORE plus Design		024 025	5/20/2013 152146	5/20/2013 152146	Registered *5/20/2023*
TEM-MX-01	Mexico	COOLCORE	COOLCORE	024	6/28/2011 1190336	11/18/2011 1253059	Registered *11/18/2021*
TEM-MX-02	Mexico	COOLCORE	COOLCORE	025	6/28/2011 1190337	11/14/2011 1190337	Registered *11/14/2021*
TEM-MX-04	Mexico	COOLCORE plus Design		035	11/25/2013 1434882		Pending

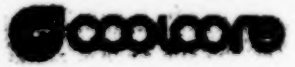
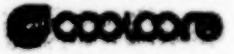
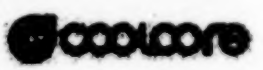
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TEM-NZ-01	New Zealand	COOLCORE	COOLCORE	024 025	6/28/2011 844716	844716	Registered
TEM-NZ-02	New Zealand	Dr. Cool plus Water Drop Logo		010	5/19/2014 998173		Pending
TEM-PA-01	Panama	COOLCORE plus Water Drop Logo		024 025	5/30/2013 223265		Pending
TEM-PA-02	Panama	Dr. Cool plus Water Drop Design		010	6/20/2013 223941	6/20/2013 223941-01	Registered *6/20/2023*

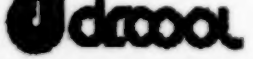
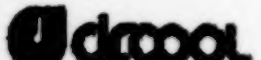
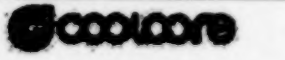
Case Number	Country	Mark	Trademark Image	Class	Filing Date Serial #	Reg Date Reg #	Status Renewal Due
TEM-PE-01	Peru	COOLCORE plus Water Drop Logo		024 025	5/30/2013 534848-2013	2/21/2014 00007645	Registered *2/21/2024*
TEM-PE-02	Peru	Dr. Cool plus Water Drop Design		010	6/20/2013 537239	12/18/2013 00206084	Registered *12/18/2023*
TEM-PH-01	Philippines	Dr. Cool By CoolCore (Stylized)		010	1/7/2013 4-2013-000154	6/20/2013 4-2013-000154	Registered *6/20/2023*
TEM-PH-02	Philippines	COOLCORE plus Design		024 025	5/8/2013 4-2013-005288	10/3/2013 4-2013-005288	Registered *10/3/2023*

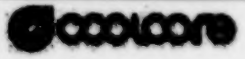
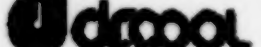
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TEM-RU-02	Russian Federation	COOLCORE plus Design		024 025	5/13/2013 2013715808	10/27/2014 525482	Registered *5/13/2023*
TEM-SA-01	Saudi Arabia	COOLCORE	COOLCORE	024	7/4/2011 169901		Pending
TEM-SA-02	Saudi Arabia	COOLCORE	COOLCORE	025	7/4/2011 169902		Pending
TEM-SA-03	Saudi Arabia	COOLCORE plus Design		025	5/18/2013 196922		Pending
TEM-SI-01	Singapore	Dr. Cool By CoolCore (Stylized)		010	1/11/2013 T1300706B	1/11/2013 TM130070 6B	Registered *1/11/2023*

Case Number	Country	Mark	Trademark Image	Class	Filing Date Serial #	Reg Date Reg #	Status Renewal Due
TEM-SI-02	Singapore	COOLCORE plus Design		024 025	5/9/2013 T1307404E	5/9/2013 T1307404E	Registered *5/9/2023*
TEM-SO-01	South Africia	Coolcore plus Design		024	4/22/2014 2013/01330		Pending
TEM-SO-02	South Africia	Coolcore plus Design		025	4/22/2014 2013/01331		Pending
TEM-SO-03	South Africia	Coolcore plus Design		035	4/22/2014 2013/01332		Pending
TEM-SO-04	South Africia	Dr. Cool plus Design		010	4/22/2014 2014/10328		Pending

Case Number	Country	Mark	Trademark Image	Class	Filing Date Serial #	Reg Date Reg #	Status Renewal Due
TEM-SO-05	South Africia	Dr. Cool plus Design		035	4/22/2014 2014-10329		Pending
TEM-SP-01	Spain	Coolcore plus Water Drop Logo		025	3/10/2015 3.552.089	6/26/2015 3552089	Registered *3/10/2025*
TEM-TH-01	Thailand	Dr. Cool By CoolCore (Stylized)		010	1/11/2013 877531		Pending
TEM-TH-02	Thailand	COOLCORE plus Design		024	5/29/2013 894154		Pending

Case Number	Country	Mark	Trademark Image	Class	Filing Date Serial #	Reg Date Reg #	Status Renewal Due
TEM-TH-03	Thailand	COOLCORE plus Design		025	5/29/2013 894155		Pending
TEM-TH-04	Thailand	COOLCORE plus Degree Logo		024	4/25/2013 890158	4/25/2013 TM391672	Registered *4/24/2023*
TEM-TH-05	Thailand	COOLCORE plus Degree Logo		025	4/25/2013 890159	4/25/2013 TM391673	Registered *4/24/2023*
TEM-TW-01	Taiwan	COOLCORE	COOLCORE	024 025	6/30/2011 100032812	10/16/2012 1543174	Registered *10/16/2022*

Case Number	Country	Mark	Trademark Image	Class	Filing Date Serial #	Reg Date Reg #	Status Renewal Due
TEM-TW-02	Taiwan	dr. cool plus Design		010	11/4/2013 102061515	6/16/2014 01648716	Registered *6/16/2024*
TEM-UAE-01	United Arab Emirates	COOLCORE plus Design		025	5/12/2013 191538	6/16/2014 191538	Registered *6/16/2024*
TEM-UAE-02	United Arab Emirates	Dr. Cool plus Design		010	4/20/2014 210213	8/31/2014 210213	Registered *4/20/2024*
TEM-UAE-03	United Arab Emirates	Coolcore plus Design		024	4/20/2014 210214	8/31/2014 21014	Registered *4/20/2024*

Case Number	Country	Mark	Trademark Image	Class	Filing Date Serial #	Reg Date Reg #	Status Renewal Due
TEM-UK-01	United Kingdom	COOLCORE plus Water Drop Logo		025	3/5/2015 3097726	5/29/2015 3097726	Registered *3/5/2015*
TEM-VI-01	Vietnam	CoolCore (word mark)	COOLCORE	024 025	9/10/2012 4-2012-20158	1/20/2014 218732	Registered *9/10/2022*
TEM-VI-02	Vietnam	Dr. Cool plus Design		010	2/19/2013 4-2013-03148	2/19/2013 223437	Registered *2/19/2023*

Case Tracking System

U.S. Trademark Summary Report

TEMPNOLOGY LLC

Date: October 7, 2015

Case Number	Mark	Trademark Image	Class	Filing Date Serial #	Reg Date Reg #	ROA Due SOU Due	Status § 8 Due § 15 Due Renewal Due
TEM-08	HEATSTAR	HEATSTAR	024 025	5/18/2002 85/629,127		ROA:	Pending
TEM-09	SOLARSTAR	SOLARSTAR	024 025	5/18/2012 85/629,136		ROA:	Pending
TEM-17	DR. COOL	Dr.Cool	010	6/28/2012 85/644,851	8/13/2013 4,385,337	ROA:	Registered 8/13/2019

Case Number	Mark	Trademark Image	Class	Filing Date Serial #	Reg Date Reg #	ROA Due SOU Due	Status § 8 Due § 15 Due Renewal Due
TEM-18	DR. COOL BY COOLCORE	Dr.Cool by CoolCore	010	6/28/2012 85/664,854	2/12/2013 4,290,312	ROA: _____	Registered 2/12/2019
TEM-20	COOLCORE	COOLCORE	035	10/19/2012 85/758,933		ROA: _____	Pending
TEM-24	CoolCore (Stylized) plus Degree	coolcore®	024	10/26/2012 85/764,959	6/11/2013 4,350,270	ROA: _____	Registered 6/1/2019
TEM-25	COOLCORE	COOL-CORE	025	9/22/2010 75/983,760	12/6/2011 4,359,494	ROA: _____	Registered 12/6/2017
TEM-26	COOLKNIT	COOLKNIT	025	6/17/2013 85/961,334		ROA: _____	Pending

Case Number	Mark	Trademark Image	Class	Filing Date Serial #	Reg Date Reg #	ROA Due SOU Due	Status § 8 Due § 15 Due Renewal Due
TEM-28	tem-plush	templush	024	6/6/2014 86/303,041		ROA: 12/8/2014	Pending
TEM-29	SYPHON-X plus Design	SYPHON-X	024	6/6/2014 86/303,041	ROA: 12/8/2014	ROA: 12/8/2014	Pending
TEM-30	COOLCORE	COOL-CORE	025	9/22/2010 85/975,730	12/6/2011 4,068,747	ROA:	Registered 12/6/2017
TEM-31	Dr. Cool	DR. COOL	035	10/23/2014 86/432,377	6/16/2015 4,755,395	ROA:	Registered 6/16/2021
TEM-32	Coolcore plus Water Drop Logo	coolcore	025	11/3/2014 86/442,998		ROA:	Pending

Case Number	Mark	Trademark Image	Class	Filing Date Serial #	Reg Date Reg #	ROA Due SOU Due	Status § 8 Due § 15 Due Renewal Due
TEM-33	COOLQ WICK (styl-ized)	COOLQUICK	024	12/24/2014 86/490,059		ROA: _____	Pending
TEM-34	Powered by CoolKnit	POWERED BY COOLKNIT	024 025	2/20/2015 86/541,321		ROA: _____	Pending
TEMP-35	Intel-litemp	INTELLITEMP	024 025	2/23/2015 86/542,701		ROA: 10/6/2015 _____	Pending
TEM-36	DR. COOL plus Wa-ter Drop Logo	dr.cool	010	3/9/2015 86/558,039		ROA: _____	Pending

Case Number	Mark	Trademark Image	Class	Filing Date Serial #	Reg Date Reg #	ROA Due SOU Due	Status § 8 Due § 15 Due Renewal Due
TEM-37	Coolcore (chemi-cal free-cooling	coolcore	025	3/11/2015 86/560,192		ROA:	Pending
TEM-38	Com-fortex	COMFORTEX	024	3/18/2015 86/568,503		ROA: 10/5/2015	Pending
TEM-39	Dr. Cool plus Wa-ter Drop Logo	dr.cool	025	4/14/2015 86/596,788		ROA:	Pending
TEM-40	Dr. Cool plus Wa-ter Drop Logo	dr.cool	025	4/14/2015 86/596,812		ROA:	Pending

Exhibit 2.2

EXCLUDED ASSETS

Notwithstanding anything contained in this Agreement or **Exhibit 2.1** to the contrary, the Excluded Assets shall include:

(a) all raw materials, work in process, finished goods, and supplies inventories on the Closing Date and all computer records and other records relating to the foregoing;

(b) all cash and cash equivalents;

(c) all rights of the Seller under this Agreement, the Ancillary Agreements and the agreements and instruments executed and delivered to the Seller by the Purchaser pursuant to this Agreement;

(d) all of the Seller's books, records, ledgers, files and documents relating to Excluded Assets;

(e) The Seller's formal corporate records, including its certificate of incorporation, bylaws, minute books, corporate books, stock transfer records and other records having to do with the corporate organization of the Seller;

(f) all personnel records and other records that the Seller is required by any Law to retain in its possession, provided that the Seller shall provide copies of such records to the Purchaser unless prohibited from doing so by Law;

(g) all causes of action under chapter 5 of the Bankruptcy Code;

(h) all of the Seller's Employee Plans except for those that the Purchaser expressly elects to assume at the Closing pursuant to Section 8.15;

(g) all existing agreements not being expressly assumed including, but not limited to, all of the Agreements between Seller and Mission Product Holdings and other agreements identified in the Debtor's Omnibus Motion to Reject Certain Executory Contracts and Unexpired Leases *Nunc Pro Tunc* to the Petition Date; and

(i) all accounts receivable on the books and records of the Seller on the Closing Date.

Exhibit 3.1

METHODOLOGY FOR CALCULATING THE PURCHASE PRICE

$1,193,000.00 Credit Bid based on Pre and Post-Petition Borrowing

+ $657,278.00 Assumed Prepetition Liabilities (see chart below)

+ $60,820.00 Approximate Assumed Post petition Liabilities

$1,911,098.00 Total Purchase Price

ASSUMED PREPETITION LIABILITIES AS OF NOVEMBER 20, 2015

Creditor	Amount to be Assumed by Purchaser
210 Commerce Way, LLC	9,763
American Arbitration Association	20,100
Baker Newman Noyes	34,040
Caseiro Burke LLC	5,761
Comcast	238
Cool Canuck V	3,000
Disney Sports Attractions	156,250
Experticity, Inc.	6,612
FirstTracks Marketing Group, LLC	16,024
GreenbergTraurig, LLC	319,637
Hohenstein	9,677
Legacy Supply Chain	19,942
Nova Tex	27,315
Portsmouth Computer	744

Creditor	Amount to be Assumed by Purchaser
Group	
Stebbins, Lazos & Van Der Beken, P.A.	26,748
Tucker Latifi	1,362
Uline	65
Total	657,278

NOTICE OF CLOSING, BANKR. DKT. 310, FILED DECEMBER 21, 2015

NOTICE OF CLOSING

PLEASE TAKE NOTICE THAT as of 6:00 p.m. on December 18, 2015 (the "Effective Date") the Debtor closed the transaction with Schleicher & Stebbins Hotels L.L.C as contemplated by that certain order (the "Sale Order"), (a) authorizing the sale of substantially all the Debtor's assets free and clear of liens, claims, encumbrances, and other interests, except as provided in the successful bidder's asset purchase agreement; (b) authorizing and approving the assumption and assignment of certain executor contracts and unexpired leases related thereto; and (d) granting related relief, dated December 16, 2015 [Dkt. No. 307].

Respectfully submitted.

TEMPNOLOGY, LLC
By its attorneys,

NIXON PEABODY LLP

Date: December 21, 2015

/s/ Daniel W Sklar
Daniel W. Sklar, Esq. BNH# 01443
Christopher Desiderio (PHV)
Christopher Fong (PHV)
Nixon Peabody LLP
900 Elm Street
Manchester, NH 03101
Phone: (603) 628-4000

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Notice of Closing* was served on this 21st day of December, 2015, via CM/ECF, e-mail, or Regular U.S. Mail on the following parties as indicated below.

VIA CM/ECF:

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Mission Holdings, Inc.
Bernstein, Shur, Sawyer & Nelson
100 Middle Street
Portland, ME 04101

Phoenix Capital Resources - Financial Advisor
110 Commons Court
Chads Ford, PA 19317

Disney Worldwide Services - Creditor
PO Box 403337
Atlanta, GA 30384-3337

Nova-tex - Creditor
Unit B, 11/F Silvercorp Tower
Nathan Road
Kowloon Hong Kong 707-713

Legacy Supply Chain Services - Creditor
c/o Griffin Transport Services, Inc.
1941 Citrona Drive
Fernandina Beach, FL 32034-4414

Hohenstein – Creditor
1688 Westbrook Ave.
Burlington, NC 27215-9700

Prime Pacific Connections,
LLC - Creditor
PO Box 15583
Irvine, CA 92623-5583

Employee #3 - Creditor
[Address Redacted]

Employee #4 – Creditor
[Address Redacted]

Employee #8 – Creditor
[Address Redacted]

Employee #9 – Creditor
[Address Redacted]

/s/ Daniel W. Sklar

MISSION PRODUCT HOLDINGS, INC. PROOF OF CLAIM, BANKR. DKT. 313-2, FILED DECEMBER 21, 2015

B10 (Official Form 10) (04/13)

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE

Case Number: 15-11400-JMD

Name of Debtor: TEMPNOLOGY LLC

PROOF OF CLAIM

COURT USE ONLY [ ]

☐ Check this box if this claim amends a previously filed claim.

Court Claim Number:_____
(*If known*)

Filed on:_____

☐ Check this box if you are aware that anyone else has filed a proof of claim relating to this claim. Attach a copy of statement giving particulars.

NOTE: ***Do not use this form to make a claim for an administrative expense that arises after the bankruptcy filing. You may file a request for payment of an administrative expense according to 11 U.S.C. § 503.***

Name of Creditor (the person or other entity to whom the debtor owes money or property):

Mission Product Holdings, Inc.

Name and address where notices should be sent:

Bernstein Shur, P.A., c/o Robert Keach
100 Middle Street, West Tower
Portland, ME 04101

Telephone number: (207) 774-1200

email: rkeach@bernsteinshur.com

Name and address where payment should be sent (if different from above):

Mission Product Holdings, Inc.
60 East 42nd Street, Suite 810
New York, NY 10165

Telephone number: (646) 695-0870

email:

1. **Amount of Claim as of Date Case Filed:**

$4,160,000.00

If all or part of the claim is secured, complete item 4.

If all or part of the claim is entitled to priority, complete item 5.

☐ Check this box if the claim includes interest or other charges in addition to the principal amount of the claim. Attach a statement that itemizes interest or charges.

2. **Basis for Claim:** See attached.
(See instruction #2)

3. **Last four digits of any number by which creditor identifies debtor:**

— — — —

3a. **Debtor may have scheduled account as:**

(See instruction #3a)

3b. Uniform Claim Identifier (optional):

_____

(See instruction #3b)

4. Secured Claim (see instruction #4)

Check the appropriate box if the claim is secured by a lien on a property or a right of setoff, attach required redacted documents, and provide the request information.

Amount of arrearage and other charges, as of the time case was filed, included in secured claim, if any:

$ _____

Nature of property or right of setoff:

☐ Real Estate ☐ Motor Vehicle ☐ Other

Describe: _____

Basis for perfection: _____

Value of Property: $_____

Amount of Secured Claim: $_____

Annual Interest Rate _____%
☐ Fixed or ☐ Variable
(when case was filed)

Amount Unsecured: $_____

5. Amount of Claim Entitled to Priority under 11 U.S.C. § 507 (a). If any part of the claim falls into one of the following categories, check the box specifying the priority and state the amount.

☐ Domestic support obligations under 11 U.S.C. § 507(a)(1)(A) or (a)(1)(B).

☐ Wages, salaries, or commissions (up to $12,475*) earned within 180 days before the case was filed or the debtor's business ceased, whichever is earlier - 11 U.S.C. § 507(a)(4).

☐ Contributions to an employee benefit plan – 11 U.S.C. § 507(a)(5).

☐ Up to $2,775* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use – 11 U.S.C. § 507(a)(7).

☐ Taxes or penalties owed to governmental units - 11 U.S.C. § 507(a)(8).

☐ Other – Specify applicable paragraph of 11 U.S.C. § 507(a)(__).

Amount entitled to priority:

$ 0.00*

**Amounts are subject to adjustment on 04/01/16 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment.*

6. Credits. The amount of all payment son this claim has been credited for the purpose of making this proof of claim. (See instruction #6)

*Amounts are estimated; Mission reserves the right to amend this claim to request that a portion be paid as an administrative expense herein.

7. Documents: Attached are redacted copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, security agreements, or, in the case of a claim based on an open-end or revolving consumer credit agreement, a statement providing the information required by

FRBP 3001(c)(3)(A). If the claim is secured, box 4 has been completed, and redacted copies of the document providing evidence of perfection of a security interest are attached. If the claim is secured by the debtor's principal residence, the Mortgage of Proof of Claim Attachment is being filed with this claim. (*See instruction #7, and the definition of "redacted".*)

DO NOT SEND ORIGINAL DOCUMENTS. ATTACHED DOCUMENTS MAY BE DESTROYED AFTER SCANNING.

If the documents are not available, please explain:

8. Signature: (See instruction #8)

Check the appropriate box.

☐ I am the creditor.

☑ I am the creditor's authorized agent.

☐ I am the trustee, or the debtor, or their authorized agent. (See Bankruptcy Rule 3004.)

☐ I am the guarantor, surety, endorser, or other codebtor. (See Bankruptcy Rule 3005.)

I declare under penalty of perjury that the information provided in this claim is true and correct to the best of my knowledge, information, and reasonable belief.

Print Name: Mike Abbott
Title: CFO
Company: Mission Product Holdings, Inc.

/s/ Mike Abbott 11/16/2015
(Signature) (Date)

Address and telephone number (if different from notice address above):

60 East 42nd Street, Suite 810
New York, NY 10165

Telephone number: (646) 695-0870

email: _____

Penalty for presenting fraudulent claim: Fine of up to $500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.

INSTRUCTIONS FOR PROOF OF CLAIM FORM

The instructions and definitions below are general explanations of the law. In certain circumstances, such as bankruptcy cases not filed voluntarily by the debtor, exceptions to these general rules may apply.

Items to be completed in Proof of Claim form

Court, Name of Debtor, and Case Number:

Fill in the federal judicial district in which the bankruptcy case was filed (for example, Central District of California), the debtor's full name, and the case number. If the creditor received a notice of the case from the bankruptcy court, all of this information is at the top of the notice.

Creditor's Name and Address:

Fill in the name of the person or entity asserting a claim and the name and address of the person who should receive notices issued during the bankruptcy case. A separate space is provided for the payment address if it differs from the notice address. See Federal Rule of Bankruptcy Procedure (FRBP) 2002(g).

1. Amount of Claim as of Date Case Filed:

State the total amount owed to the creditor on the date of the bankruptcy filing. Follow the instructions concerning whether to complete items 4 and 5. Check the box if interest or other charges are included in the claim.

2. Basis for Claim:

State the type of debt or how it was incurred. Examples include goods sold, money loaned, services performed, personal injury/wrongful death, car loan, mortgage note, and credit card. If the claim is based on delivering health care goods or services, limit the disclosure of the goods or services so as to avoid embarrassment or the disclosure of confidential health care information. You may be required to provide additional disclosure if an interested party objects to the claim.

3. Last Four Digits of Any Number by Which Creditor Identifies Debtor:

State only the last four digits of the debtor's account or other number used by the creditor to identify the debtor.

3a. Debtor May Have Scheduled Account As:

Report a change in the creditor's name, a transferred claim, or any other information that clarifies a difference between this proof of claim and the claim as scheduled by the debtor.

3b. Uniform Claim Identifier:

If you use a uniform claim identifier, you may report it here. A uniform claim identifier is an optional 24-character identifier that certain large creditors use to facilitate electronic payment in chapter 13 cases.

4. Secured Claim:

Check whether the claim is fully or partially secured. Skip this section if the claim is entirely unsecured. (See Definitions.) If the claim is secured, check the box for the nature and value of property that secures the claim, attach copies of lien documentation, and state, as of the date of the bankruptcy filing, the annual interest rate (and whether it is fixed or variable), and the amount past due on the claim.

5. Amount of Claim Entitled to Priority Under 11 U.S.C. § 507(a)

If any portion of the claim falls into any category shown, check the appropriate box(es) and state the amount entitled to priority. (See Definitions.) A claim may be partly priority and partly non-priority. For example, in some of the categories, the law limits the amount entitled to priority.

6. Credits:

An authorized signature on this proof of claim serves as an acknowledgement that when calculating the amount of the claim, the creditor gave the debtor credit for any payments received toward the debt.

7. Documents:

Attach redacted copies of any documents that show the debt exists and a lien secures the debt. You must also attach copies of documents that evidence perfection of any security interest and documents required by FRBP 3001(c) for claims based on an open-end or revolving consumer credit agreement or secured by a security interest in the debtor's principal residence. You may also attach a summary in addition to the documents themselves. FRBP 3001(c) and (d). If the claim is based on delivering health care goods or services, limit

disclosing confidential health care information. Do not send original documents, as attachments may be destroyed after scanning.

8. Date and Signature:

The individual completing this proof of claim must sign and date it. FRBP 9011. If the claim is filed electronically, FRBP 5005(a)(2) authorizes courts to establish local rules specifying what constitutes a signature. If you sign this form, you declare under penalty of perjury that the information provided is true and correct to the best of your knowledge, information, and reasonable belief. Your signature is also a certification that the claim meets the requirements of FRBP 9011(b). Whether the claim is filed electronically or in person, if your name is on the signature line, you are responsible for the declaration. Print the name and title, if any, of the creditor other person authorized to file this claim. State the filer's address and telephone number it differs from the address given on the top of the form for the purposes of receiving notices. If the claim is filed by an authorized agent, provide both the name of the individual filing the claim and the name of the agent. If the authorized agent is a servicer, identify the corporate servicer as the company. Criminal penalties apply for making a false statement on a proof of claim.

[Exhibit A to Proof of Claim]

Debtor: Tempnology LLC, 15-11400-JMD ("Debtor")
Creditor: Mission Product Holdings, Inc. ("Mission")
Estimated Damages as of November 13, 2015

I.	**Intentional Misconduct (including legal costs)**	
	a. Mediation	$275,000
	b. Arbitration	$75,000
	c. Bankruptcy	$100,00
		$450,000
II.	**Breach of Exclusivity Provisions (net profit)**	
	a. Disneyworld and Imperial Hats	$210,00
III.	**Failure to Defend IP Against Competitors (net profit)**	
	a. Arctic Cove - Home Depot[1]	$500,000
	b. Arctic Cool - Costco[2]	$500,000
	c. Perfect Towel - WalMart	$500,000
	d. 2015 Net Profit (total)	$1,500,000
	e. 2016 Net Profit[3]	$1,500,000

[1] Arctic Cove: $6.0mil. Retail Sales of Microfiber/$15.00 AUR/400,000units/$5.0 wholesale margin = $2,000,000 * 25% (MP cannibalization factor) = $500,000

[2] Artic Cool: $7.9mil. Retail Sales of Microfiber/$19.75 AUR/400,000units/$5.0 wholesale margin = $2,000,000 * 25% (MP cannibalization Factor) = $500,000

[3] 2016 Net Profit damages are estimated, and assume, for the sake of this claim, that Mission's exclusive rights to the Debtor's intellectual property through July 1, 2016 have been rejected in this bankruptcy.

IV. Damage to Relationships	$500,000
Total:	**$4,160,000**[4]

[4] Total damages are estimated and subject to revision. Damages assume, for the sake of this claim, that Mission's exclusive rights to the Debtor's intellectual property through July 1, 2016 have been rejected in this bankruptcy. Mission has initiated an appeal of the Bankruptcy Court's Order [D.E. 240] regarding Mission's exclusivity rights pursuant to 11 U.S.C. § 365(n); Mission reserves the right to amend this claim to request that a portion of the above damages be paid as an administrative expense herein.

MISSION PRODUCT HOLDINGS, INC. LETTER OF APRIL 16, 2015, BANKR. DKT. 313-3, FILED DECEMBER 21, 2015

MISSION PRODUCT HOLDINGS INC.
60 East 42nd Street
New York, New York 10065

April 16, 2015

Kevin McCarthy
President
Tempnology LLC
210 Coomerce Way, Suite 100
Portsmouth, NH 03801

Dear Mr. McCarthy:

I write in response to your April 8, 2015 letter.

Mission disagrees for at least two reasons with your assertion that the "Restricted Period" for cooling apparel products terminated on December 27, 2014. First, and as Mission has made clear throughout the arbitration proceedings, hats are not apparel, so any Restricted Period has not yet begun to run. Second, the Restricted Period runs separately for each and every new apparel product that is ready for shipping to retail distribution. Accordingly, Coolcore is required to disclose to Mission the nature of the "additional cooling apparel products" referenced in your letter so the Parties can comply with their obligations under Section 6 of the Agreement.

As you know, from July 22, 2104 to March 3, 2015 (the date on which the arbitration hearings began), Coolcore steadfastly maintained that the Agreement

has been terminated and is no longer in effect. During the hearings, Coolcore took contradictory positions, at times asserting that the Agreement is no longer in effect and, at other times, suggesting that Mission's obligation to source product from Coolcore continued, pending the results of arbitration. In your April 8 letter, you once again assert that the Agreement is not in effect. If Coolcore is now prepared to acknowledge that the Agreement remains in effect, pending the results of arbitration, please let me know, and please send me information about the additional cooling products.

Finally, pursuant to Section 14 of the Agreement, Mission is not obligated to purchase any product from Coolcore for the 2015-2016 Contract Year, after which the Agreement will terminate. Without in any way waiving its right to source product from Coolcore under the Agreement, Mission states in good faith that it does not presently contemplate making any purchases from Coolcore for the 2015-2016 Contract Year.

Very truly yours,

/s/ Joshua Shaw
Joshua Shaw

ORDER RE SUBMISSION OF MOOTNESS LETTERS, 1ST CIR. ENTRY ID 6116611, FILED AUGUST 30, 2017

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 16-9016

IN RE TEMPNOLOGY, LLC, N/K/A OLD COLD, LLC,
Debtor,

MISSION PRODUCT HOLDINGS, INC.,
Appellant,

v.

TEMPNOLOGY, LLC, N/K/A OLD COLD, LLC.,
Appellee,

ORDER OF COURT

Entered: August 30, 2017

Each party is ordered to submit by **12:00 noon on Friday, September 8, 2017,** a letter of no more than twelve pages addressing whether all exclusivity and trademark rights, even if preserved under 11 U.S.C. § 365(n), have now expired, rendering the disputes in this case moot, given that the wind-down period of the Co-Marketing and Distribution Agreement (the "Agreement") expired on July 1, 2016. Specifically, the letter should address, without limitation:

1. If it is determined that Mission retained any exclusivity rights under 11 U.S.C. § 365(n), the basis for any contentions that such rights were breached post-rejection and prior to expiration of the contract, and if so, that Mission suffered any harm;

2. The basis for any contention that Mission did or would have used the trademarks licensed under § 15(d) of the Agreement post-rejection and prior to expiration of the contract;

3. Whether and how Mission would be entitled to any injunctive relief should it prevail; and

4. To what extent Mission has and asserts any claim in the event it is determined that no rights to trademarks in § 15(d) of the Agreement survived expiration of the contract term.

The twelve-page limit will not be expanded.

By the Court:

/s/ Margaret Carter, Clerk

cc:
Daniel W. Sklar
Lee A. Harrington
Christopher M. Desiderio
Robert James Keach
Michael A. Klass
Lindsay K. Zahradka
Michael Steven Askenaizer
Edmond J. Ford
Ann Marie Dirsa

MISSION PRODUCT HOLDINGS, INC. MOOTNESS LETTER, 1ST CIR. ENTRY ID 6118579, FILED SEPTEMBER 8, 2017

[Bernstein Shur letterhead]

September 8, 2017

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT
c/o Margaret Carter, Clerk
John Joseph Moakley United States Courthouse
1 Courthouse Way, Suite 2500
Boston, MA 02210

Re: Mission Product Holdings, Inc. v. Tempnology, LLC n/k/a Old Cold, LLC, Case No. 16-9016

Dear Ms. Carter:

Appellant, Mission Product Holdings, Inc. ("Mission"), writes in response to the Circuit's August 30, 2017 Order (Document No. 00117195483) seeking additional information regarding whether the disputes in this case might be moot, given that the wind-down period ("Wind-Down Period") of the Co-Marketing and Distribution Agreement (the "Agreement") that is involved in this appeal expired on July 1, 2016. The expiration of the Wind-Down Period, and the expiration of exclusivity under the Agreement, do not result in mootness. As the parties, and the U.S. Bankruptcy Court for the District of New Hampshire (the "Bankruptcy Court") and New York Court (as defined below), have concurred in agreeing to (and ordering) stays of existing litigation pending the outcome of this appeal, the result of this appeal will determine the direction, if not the outcome, of that pending litigation. That out-

come will dictate the scope and priority of Mission's claims in that litigation.

The entire purpose of the Appellee's pre-bankruptcy activity and chapter 11 case was to relieve the Debtor, Tempnology, LLC (formerly also known as "Coolcore") of the "burdens" of the Agreement, and allow the Debtor to source and sell products in Mission's exclusive territory (including the entire United States). Both before and after rejecting the Agreement in the chapter 11 case, the Debtor violated Mission's exclusive rights by securing and selling within the exclusive territory products covered by the Agreement. The Debtor entered into contracts with counterparties that were properly Mission's counterparties. All profits from those sales and contracts, including the majority that occurred post-rejection, are properly Mission's profits. Mission asserted those rights by asserting an administrative claim in the chapter 11 case that remains unresolved, by agreement, pending this appeal. Mission also sued Schleicher & Stebbins Hotels, LLC ("S&S") in the United States District Court for the Southern District of New York (the "New York Court") for, *inter alia*, tortious interference for its role in compelling the Debtor to breach, and continue to breach post-rejection, the Agreement, including its exclusivity provisions. Proceedings in that case are stayed pending this appeal as well, since the outcome of the appeal will dictate the direction of that case, affecting both the potential viability of the claims and the extent of damages. Accordingly, the disputes in this case involve claims and causes of action that were asserted prior to expiration of the Agreement and which include claims accruing post- rejection and prior to expiration of the Wind-Down Period. Such claims and this appeal, therefore, were not rendered moot by the end of the Wind-Down

Period, but rather resolution of this appeal will directly determine the validity, extent, and priority of those post-rejection, pre-expiration claims.

As this Circuit has summarized: "An appeal becomes moot if an intervening event strips the parties of any legally cognizable interest in the outcome." *Connectu LLC v. Zuckerberg*, 522 F.3d 82, 88 (1st Cir. 2008). This Circuit has stated that "[i]t is ordinarily true that a challenge to a contract becomes moot upon that contract's expiration. . . . Once a contract has expired, and the obligations between its signatories have ended, ***and if no damages are sought***, the parties usually do not have a legally cognizable interest in the case's outcome." *Am. Civil Liberties Union of Mass. v. U.S. Conference of Catholic Bishops*, 705 F.3d 44, 53 (1st Cir. 2013) (internal citations omitted; emphasis supplied). Here, of course, Mission has sought damages, both in the Bankruptcy Court and the New York Court, and this appeal will directly affect the scope of Mission's damages claims in both courts. The appeal will determine the extent of Mission's claims and their priority in the chapter 11 case.[1] This, of course, invests Mission with a direct and legally cognizable interest in the outcome of the appeal. *Zuckerberg*, 522 F.3d at 89 (collateral consequences forestalling mootness result when outcome of the appeal will affect pending or future litigation). *See also Patriot Cinemas, Inc. v. Gen. Cinemas Corp.*, 834 F.2d 208, 215-16 (1st Cir. 1987) (that outcome of appeal would affect scope of claims in pending federal action provided appellant with legally cognizable interest in the outcome of the appeal and defused any claims of mootness); *MCI Telecoms. Corp. v.*

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[1] If Mission is correct that exclusivity survived rejection, it will have administrative claims to assert in the chapter 11 case.

Matrix Commc'ns Corp., 135 F.3d 27, 30 (1st Cir. 1998) (where parties will return to courtroom to resolve dispute if certain outcome on appeal, appeal not moot).

With that introduction, Mission will address each of the Circuit's questions in order.

1. If it is determined that Mission retained any exclusivity rights under 11 U.S.C. § 365(n), the basis for any contentions that such rights were breached post-rejection and prior to expiration of the contract, and if so, that Mission suffered any harm.

As the Circuit is aware, this appeal arises from the Agreement between Mission and Tempnology, LLC d/b/a Coolcore in which Coolcore granted Mission certain exclusive rights, including the exclusive right to distribute personal cooling products in the United States. Prior to the commencement of Coolcore's chapter 11 case, the parties were involved in arbitration over the Agreement. At issue in the arbitration, among other issues, was whether the Debtor had improperly repudiated the Agreement, and, if so, whether Mission was relieved of any obligation to source product from the Debtor during the Wind-Down Period. Phase I of the arbitration also encompassed whether the Agreement remained in full force and effect for the two-year Wind-Down Period. In Phase I of the arbitration, which addressed those issues, the arbitrator ruled completely in favor of Mission, stating as follows:

> On August 1, 2014, Mission sent Coolcore a purchase order for woven towels. (Exh. 84). Coolcore declined to fulfill the order, offering as a basis "the current dispute over whether the Agreement is in effect we will not be accepting that order at present." (Exh. 87.) McCarthy explained "[w]e just said we are go-

ing to stop right now because we are spending a lot of money developing this until we get further notice. That is why we stopped. This was costing us money." (Tr. 675-76).

Respondent [Coolcore] points out, correctly, that Claimant [Mission] notified it on July 19, 2014 that it was "reworking our go-forward plan as it related to the 2015 plan, forecast, supply chain and logistics" and would follow up the following week or so, but failed to do so. (Exh. 121). The fact that Mission was "reworking" its plans after providing notice of a termination without cause is not surprising and does not evidence an intent to breach the Agreement once in wind-down mode. If that were the case and Claimant failed to live up to its obligations, then Coolcore had the remedies available to it under the Agreement.

Similarly, Coolcore's position with respect to Mission's use of its trademark is untenable. By letter dated October 9, 2014, Coolcore took the position that due to the alleged breach of Paragraph 18 Mission's use of Coolcore's trademarks was unauthorized and constituted a violation of federal law. The Agreement also required that the parties "mutually agree" upon the placement of Coolcore's branding of the product. Such agreement did not occur nor is it reasonable to expect that Mission would include such branding on its products after having been told that Coolcore viewed any use of the branding was unauthorized and violative of federal trademark law.

> In sum, Coolcore, having announced as of July 22, 2014 that the Agreement was terminated effective immediately and having maintained that position consistently for most of the next three months, clearly repudiated the Agreement. Its subsequent actions in (a) refusing to maintain the status quo until the dispute resolution process was completed, (b) withdrawing authorization for Mission to use its trademark, and (c) its failure to fill a purchase order submitted by Mission dated August 1, 2014 merely served to reaffirm Respondent's decision to repudiate. Such repudiation relieved Mission of its duty to comply with its own obligations under the Agreement, specifically to source materials from Respondent, at least until the dispute resolution process addressed the issues.
>
> **Conclusion**
>
> For the reasons offered above, the Agreement remains in full force and effect and Mission is relieved of its obligation to source products, as otherwise provided for in the Agreement, through to the date of this Partial Final Award.
>
> This matter will proceed to a second hearing to address any issues that may flow from the Respondent's failure to abide by the Agreement after issuance of Mission's notice of termination without cause. This will include claims for alleged breaches of the Agreement and damage claims brought by Claimant.

Partial Final Award, American Arbitration Association, Commercial Arbitration Tribunal, Case No. 01-14-0001-7319 (June 10, 2015).

As a direct consequence of that loss, Coolcore filed for relief under chapter 11 of the United States Bankruptcy Code, seeking to accomplish what it failed to do in arbitration: termination of the Agreement. After Coolcore filed its chapter 11 bankruptcy petition on September 1, 2015, Coolcore moved to reject the Agreement (and sought to limit Mission's § 365(n) rights). Based on the rulings below—now challenged on this and a related appeal—Coolcore then sold substantially all of its assets, including intellectual property, to S&S.

On appeal, Mission asserts, among other things, that the Bankruptcy Court erred in holding that Coolcore's rejection of the Agreement terminated Mission's exclusive rights. If this Court agrees with Mission and holds that, either under *Sunbeam Products* [2] or pursuant to 11 U.S.C. § 365(n), Mission's exclusive rights survived the rejection, sales or any contracts between Coolcore and another company after the rejection and prior to the end of the Wind-Down Period involving distribution in the United States would (i) violate Mission's exclusive rights under the Agreement during the Wind-Down Period, (ii) cause monetary harm to Mission from loss of its bargained-for exclusive license to the extent of lost profits and other benefits, and (iii) provide Mission with a claim against the Debtor's estate for such violations, and, at a minimum, to the extent of such profits.

These post-rejection, pre-expiration violations of the Agreement are not hypothetical. Just prior to bankruptcy, Coolcore demonstrated its desire and willingness to breach the exclusivity provision in the

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[2] *Sunbeam Prods., Inc. v. Chi. Am. Mfg., LLC*, 686 F.3d 372 (7th Cir. 2012).

Agreement. In November 2014, Coolcore executed a letter of intent with Paramount Apparel International, Inc. concerning the sourcing and distribution of cooling hats and towels in the United States. And in February 2015, Coolcore entered into a contract with one of the world's largest entertainment companies—Disney—regarding the sale of cooling towels and other products at certain events to be held in the United States. Mission understands that these agreements remained in effect post-rejection and therefore each constituted an ongoing violation of the Agreement to the detriment of Mission prior to expiration of the Wind-Down Period. Discovery has been stayed by agreement in the proceedings described below, but Mission is confident, based upon what is public knowledge in the industry, that the Debtor entered into numerous post-rejection agreements to source and sell product within the United States. The Debtor cannot seriously claim otherwise.

The circumstances surrounding these breaches of the Agreement, among other misconduct, also gave rise to Mission's tortious interference lawsuit against S&S in the New York Court (the "*New York Case*"). *See* Complaint, ECF No. 2, Case No. 2:15-cv-09785-VEC (S.D.N.Y. Dec. 16, 2015). In recognition of the overlap between the issues on appeal here and Mission's tortious interference claim relating to the Agreement—including the threshold question of whether Mission maintained any post-rejection exclusive rights under the Agreement—the New York Case currently is stayed by agreement pending resolution of this appeal, as well as the related appeal in Case No. 16-9012. *See* Order, ECF No. 25, Case No. 2:15-cv-09785-VEC (S.D.N.Y. Jan. 13, 2017), attached hereto as **Exhibit A**.

In addition, upon information and belief, Mission understands that Coolcore and S&S negotiated and entered into other contracts relating to cooling products in the United States post-bankruptcy and prior to expiration of the Wind-Down Period, including contracts with Imperial Hats, Disneyworld, Academy (Magellan Cooling Multi Cool), Target (C9 Cooling Towel), and Home Depot (Arctic Cove Cooling Towel). *See* Mission Proof of Claim No. 6-1, Case No. 15-11400-JMD (Bankr. D.N.H. Nov. 16, 2015), attached hereto as **Exhibit B** (claim for breach of exclusivity provision as to Disneyworld and Imperial Hats). If this Court finds that the exclusivity provision survived the rejection, each Coolcore or S&S contract would be a violation of the Agreement's exclusivity provision and would give rise to a claim by Mission. Discovery will undoubtedly reveal several additional contracts. Mission's damages, as set forth only in part in the proof of claim, are in the millions of dollars.

Finally, because the outcome of this appeal will directly affect Mission's claims against the Debtor's estate based on Mission's post-rejection exclusivity and trademark rights under the Agreement, and will determine if such claims are administrative claims, the Bankruptcy Court granted a stipulated stay between the Debtor, S&S, and Mission as to the Debtor's objection to Mission's proof of claim, and other pending matters. *See* Stipulated Order Concerning Stay of Certain Matters, ECF No. 375, Case No. 15-11400-JMD (Bankr. D.N.H. Feb. 3, 2016), attached hereto as **Exhibit C**. Accordingly, expiration of the Wind-Down Period in no way mooted this appeal because Mission's post-

rejection, pre-expiration claims remain very much at issue.[3]

2. The basis for any contention that Mission did or would have used the trademarks licensed under § 15(d) of the Agreement post-rejection and prior to expiration of the contract.

On June 30, 2014, Mission sent Coolcore a notice exercising its contractual right to terminate the Agreement, thereby triggering the two-year Wind-Down Period during which the Agreement remained in full effect, including the exclusivity provision and Mission's rights to use Coolcore's trademarks. As the arbitrator ruled, the Debtor's pre-bankruptcy attempts to curtail Mission's use of the trademarks were unlawful. Through its attempted rejection of the Agreement, the Debtor attempted to prevent Mission from using its trademark rights without interference from the Debtor or the purchaser of the Debtor's assets, S&S.

Under § 15(d) of the Agreement, the Debtor granted Mission a non-exclusive right to use its Coolcore trademark and logo (and other trademarks) in furtherance of Mission's performance under the Agreement:

> During the Term of this Agreement and the Wind-Down Period, CC grants to MP a non-exclusive, non-transferable, limited license, which shall expire upon the termination of this Agreement except as necessary to allow either party to exercise its rights during the Wind-Down Period, to use its Coolcore trademark and logo (as well as any other Marks licensed hereunder) for the limited purpose of perform-

---

[3] In addition, the Debtor's chapter 11 case, and any plan process in the case, is in abeyance pending the outcome of this appeal.

> ing its obligations hereunder, exercising its rights and promoting the purposes of this Agreement as contemplated herein, in each instance so long as not done by MP in a (i) disparaging or inaccurate manner or (ii) manner which is in consistent with the terms of this Agreement.
>
> * * *
>
> Notwithstanding any other provision herein, the rights granted to MP under this Section shall continue throughout the Wind Down Period.

Use of the trademarks was thus acknowledged by Coolcore to be an element of Mission's performance under the Agreement; when Mission sold products within the exclusive territory, it used the trademarks. The Agreement expressly extended such use to the Wind-Down Period.

On appeal, Mission asserts that the Bankruptcy Court erred in ruling that the Debtor's rejection of the Agreement terminated Mission's rights to use the Debtor's trademarks under the Agreement. But for that decision finding that the rejection terminated Mission's trademark rights under the Agreement, Mission would have continued operating its business using Coolcore's trademarks under the terms of the Agreement and in furtherance of its exclusive rights. Mission therefore suffered damages as a result of its inability to use the trademarks after the rejection and prior to the expiration of the Wind-Down Period as a result of the Bankruptcy Court's decision. Reversal of that decision on appeal would reinstate those rights as to Mission and establish Mission's claim against the Debtor's es-

tate for its damages, which would constitute an administrative claim.

3. Whether and how Mission would be entitled to any injunctive relief should it prevail.

Because the Wind-Down Period in the Agreement has concluded, Mission does not believe that injunctive relief is required should it prevail. Mission has not previously sought injunctive relief and only seeks monetary relief before the Bankruptcy Court and the New York Court.

4. To what extent Mission has and asserts any claim in the event it is determined that no rights to trademarks in § 15(d) of the Agreement survived expiration of the contract term.

If this Court determines that Mission's rights to use the Coolcore trademarks under § 15(d) of the Agreement did not survive expiration of the contract term, Mission maintains that it is entitled to a claim for breach of § 15(d) as to the post-rejection, pre-expiration period, to the extent claims accrued prior to expiration (as detailed above). As detailed above, Mission's rights arising under the Agreement during that period are at issue in this appeal, and a favorable resolution for Mission will implicate the validity, extent, and priority of Mission's claims against the estate and third parties. For this reason, Appellees jointly sought stays pending appeal below and agreed, as did the courts, that this appeal would affect the validity, extent, and priority of Mission's claims.

For all of the reasons set forth above, Mission has a legally cognizable interest in the outcome of the appeal, and the appeal is not moot.

Sincerely,

/s/ Robert J. Keach

Robert J. Keach
Counsel to Mission Product Holdings, Inc.

cc:- Michael Steven Askenaizer (via ECF)
Christopher M. Desiderio (via ECF)
Ann Marie Dirsa (via ECF)
Edmond J. Ford (via ECF)
Lee A. Harrington (via ECF)
Robert James Keach (via ECF)
Daniel W. Sklar (via ECF)
Lindsay K. Zahradka (via ECF)

[Exhibit A]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

15-CV-9785 (VEC)

MISSION PRODUCT HOLDINGS, INC.,
Plaintiff,

v.

SCHLEICHER & STEBBINS HOTELS, LLC,
Defendant,

ORDER

VALERIE CAPRONI, United States District Judge:

WHEREAS this Court stayed this case *sine die* pending the disposition of Plaintiff's appeals before the First Circuit's Bankruptcy Appellate Panel [Dkt. 20];

WHEREAS Plaintiff appealed the First Circuit Bankruptcy Appellate Panel's decisions to the First Circuit;

IT IS HEREBY ORDERED that this case will continue to be STAYED *sine die* pending the disposition of the appeals in the First Circuit. Within one week of the First Circuit's disposition of the appeals, the parties must file a joint letter informing this Court of the First Circuit's decisions. The letter also must address: (1) the effect of the First Circuit's decisions on this case; (2) whether the stay in this case should be lifted; and (3) a proposed discovery schedule and briefing schedule for any anticipated motions, if the stay is lifted.

SO ORDERED.

/s/ Valerie Caproni

Date: January 13, 2017 **VALERIE CAPRONI**
New York, New York **United States District Judge**

[Exhibit B]

B10 (Official Form 10) (04/13)

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE

Case Number: 15-11400-JMD

Name of Debtor: TEMPNOLOGY LLC

PROOF OF CLAIM

COURT USE ONLY [ ]

☐ Check this box if this claim amends a previously filed claim.

Court Claim Number:_____
(If known)

Filed on:_____

☐ Check this box if you are aware that anyone else has filed a proof of claim relating to this claim. Attach a copy of statement giving particulars.

NOTE: *Do not use this form to make a claim for an administrative expense that arises after the bankruptcy filing. You may file a request for payment of an administrative expense according to 11 U.S.C. § 503.*

Name of Creditor (the person or other entity to whom the debtor owes money or property):

Mission Product Holdings, Inc.

Name and address where notices should be sent:

Bernstein Shur, P.A., c/o Robert Keach
100 Middle Street, West Tower
Portland, ME 04101

Telephone number: (207) 774-1200

email: rkeach@bernsteinshur.com

Name and address where payment should be sent (if different from above):

Mission Product Holdings, Inc.
60 East 42nd Street, Suite 810
New York, NY 10165

Telephone number: (646) 695-0870

email:

1. **Amount of Claim as of Date Case Filed**:

$4,160,000.00

If all or part of the claim is secured, complete item 4.

If all or part of the claim is entitled to priority, complete item 5.

☐ Check this box if the claim includes interest or other charges in addition to the principal amount of the claim. Attach a statement that itemizes interest or charges.

2. **Basis for Claim**: See attached.
(See instruction #2)

3. **Last four digits of any number by which creditor identifies debtor:**

— — — —

3a. **Debtor may have scheduled account as:**

(See instruction #3a)

3b. **Uniform Claim Identifier (optional):**

(See instruction #3b)

4. **Secured Claim** (see instruction #4)

Check the appropriate box if the claim is secured by a lien on a property or a right of setoff, attach

required redacted documents, and provide the request information.

Amount of arrearage and other charges, as of the time case was filed, included in secured claim, if any:

$ _____

Nature of property or right of setoff:

☐ Real Estate ☐ Motor Vehicle ☐ Other

Describe: _____

Basis for perfection: _____

Value of Property: $_____

Amount of Secured Claim: $_____

Annual Interest Rate _____%
☐ Fixed or ☐ Variable
(when case was filed)

Amount Unsecured: $_____

5. Amount of Claim Entitled to Priority under 11 U.S.C. § 507 (a). If any part of the claim falls into one of the following categories, check the box specifying the priority and state the amount.

☐ Domestic support obligations under 11 U.S.C. § 507(a)(1)(A) or (a)(1)(B).

☐ Wages, salaries, or commissions (up to $12,475*) earned within 180 days before the case was filed or the debtor's business ceased, whichever is earlier - 11 U.S.C. § 507(a)(4).

☐ Contributions to an employee benefit plan – 11 U.S.C. § 507(a)(5).

☐ Up to $2,775* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use – 11 U.S.C. § 507(a)(7).

☐ Taxes or penalties owed to governmental units - 11 U.S.C. § 507(a)(8).

☐ Other – Specify applicable paragraph of 11 U.S.C. § 507(a)(__).

Amount entitled to priority:

$ 0.00*

**Amounts are subject to adjustment on 04/01/16 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment.*

6. Credits. The amount of all payment son this claim has been credited for the purpose of making this proof of claim. (See instruction #6)

*Amounts are estimated; Mission reserves the right to amend this claim to request that a portion be paid as an administrative expense herein.

7. Documents: Attached are redacted copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, security agreements, or, in the case of a claim based on an open-end or revolving consumer credit agreement, a statement providing the information required by FRBP 3001(c)(3)(A). If the claim is secured, box 4 has been completed, and redacted copies of the document providing evidence of perfection of a security interest are attached. If the claim is secured by the debtor's principal residence, the Mortgage of Proof of Claim Attachment is being filed with this claim. (*See instruction #7, and the definition of "redacted".*)

DO NOT SEND ORIGINAL DOCUMENTS. ATTACHED DOCUMENTS MAY BE DESTROYED AFTER SCANNING.

If the documents are not available, please explain:

8. Signature: (See instruction #8)

Check the appropriate box.

☐ I am the creditor.

☑ I am the creditor's authorized agent.

☐ I am the trustee, or the debtor, or their authorized agent. (See Bankruptcy Rule 3004.)

☐ I am the guarantor, surety, endorser, or other codebtor. (See Bankruptcy Rule 3005.)

I declare under penalty of perjury that the information provided in this claim is true and correct to the best of my knowledge, information, and reasonable belief.

Print Name: Mike Abbott
Title: CFO
Company: Mission Product Holdings, Inc.

/s/ Mike Abbott 11/16/2015
(Signature) (Date)

Address and telephone number (if different from notice address above):

60 East 42nd Street, Suite 810
New York, NY 10165

Telephone number: (646) 695-0870

email:

Penalty for presenting fraudulent claim: Fine of up to $500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.

INSTRUCTIONS FOR PROOF OF CLAIM FORM

The instructions and definitions below are general exceptions of the law. In certain circumstances, such as bankruptcy cases not filed voluntarily by the debtor, expectations to these general rules may apply.

Items to be completed in Proof of Claim form

Court, Name of Debtor, and Case Number:

Fill in the federal judicial district in which the bankruptcy case was filed (for example, Central District of California), the debtor's full name, and the case number. If the creditor received a notice of the case from the bankruptcy court, all of this information is at the top of the notice.

Creditor's Name and Address:

Fill in the name of the person or entity asserting a claim and the name and address of the person who should receive notices issued during the bankruptcy case. A separate space is provided for the payment address if it differs from the notice address. See Federal Rule of Bankruptcy Procedure (FRBP) 2002(g).

1. Amount of Claim as of Date Case Filed:

State the total amount owed to the creditor on the date of the bankruptcy filing. Follow the instructions concerning whether to complete items 4 and 5. Check the box if interest or other charges are included in the claim.

2. Basis for Claim:

State the type of debt or how it was incurred. Examples include goods sold, money loaned, services performed, personal injury/wrongful death, car loan, mortgage note, and credit card. If the claim is based on delivering health care goods or services, limit the disclosure of the goods or services so as to avoid embarrassment or the disclosure of confidential health care information. You may be required to provide additional disclosure if an interested party objects to the claim.

3. Last Four Digits of Any Number by Which Creditor Identifies Debtor:

State only the last four digits of the debtor's account or other number used by the creditor to identify the debtor.

3a. Debtor May Have Scheduled Account As:

Report a change in the creditor's name, a transferred claim, or any other information that clarifies a difference between this proof of claim and the claim as scheduled by the debtor.

3b. Uniform Claim Identifier:

If you use a uniform claim identifier, you may report it here. A uniform claim identifier is an optional 24-character identifier that certain large creditors use to facilitate electronic payment in chapter 13 cases.

4. Secured Claim:

Check whether the claim is fully or partially secured. Skip this section if the claim is entirely unsecured. (See Definitions.) If the claim is secured, check the box for the nature and value of property that secures the claim, attach copies of lien documentation, and state, as of the date of the bankruptcy filing, the annual interest rate

(and whether it is fixed or variable)., and the amount past due on the claim.

5. Amount of Claim Entitled to Priority Under 11 U.S.C. § 507(a)

If any portion of the claim falls into any category shown, check the appropriate box(es) and state the amount entitled to priority. (See Definitions.) A claim may be partly priority and partly non-priority. For example, in some of the categories, the law limits the amount entitled to priority.

6. Credits:

An authorized signature on this proof of claim serves as an acknowledgement that when calculating the amount of the claim, the creditor gave the debtor credit for any payments received toward the debt.

7. Documents:

Attach redacted copies of any documents that show the debts exists and a lien secures the debt. You must also attach copies of documents that evidence perfection of any security interest and documents required by FRBP 3001(c) for claims based on an open-end or revolving consumer credit agreement or secured by a security interest in the debtor's principal residence. You may also attach a summary in addition to the documents themselves. FRBP 3001(c) and (d). If the claim is based on delivering health care goods or services, limit disclosing confidential health care information. Do not send original documents, as attachments may be destroyed after scanning.

8. Date and Signature:

The individual completing this proof of claim must sign and date it. FRBP 9011. If the claim is filed electroni-

cally, FRBP 5005(a)(2) authorizes courts to establish local rules specifying what constitutes a signature. If you sign this form, you declare under penalty of perjury that the information provided is try and correct to the best of your knowledge, information, and reasonable belief. Your signature is also a certification that the claim meets the requirements of FRBP 9011(b). Whether the claim is filed electronically or in person, if your name is on the signature line, you are responsible for the declaration. Print the name and title, if any, of the creditor other person authorized to file this claim. State the filer's address and telephone number it differs from the address given on the top of the form for the purposes of receiving notices. If the claim is filed by an authorized agent, provide both the name of the individual filing the claim and the name of the agent. If the authorized agent is a servicer, identify the corporate servicers as the company. Criminal penalties apply for making a false statement on a proof of claim.

[Exhibit A to Proof of Claim]

Debtor: Tempnology LLC, 15-11400-JMD ("Debtor")
Creditor: Mission Product Holdings, Inc. ("Mission")
Estimated Damages as of November 13, 2015

I.	**Intentional Misconduct (including legal costs)**	
	a. Mediation	$275,000
	b. Arbitration	$75,000
	c. Bankruptcy	$100,00
		$450,000
II.	**Breach of Exclusivity Provisions (net profit)**	
	a. Disneyworld and Imperial Hats	$210,00

III. Failure to Defend IP Against Competitors (net profit)	
a. Arctic Cove - Home Depot[1]	$500,000
b. Arctic Cool - Costco[2]	$500,000
c. Perfect Towel - Wal Mart	$500,000
d. 2015 Net Profit (total)	$1,500,000
e. 2016 Net Profit[3]	$1,500,000
IV. Damage to Relationships	$500,000
Total:	**$4,160,000[4]**

[1] Arctic Cove: $6.0mil. Retail Sales of Microfiber/$15.00 AUR/400,000units/$5.0 wholesale margin = $2,000,000 * 25% (MP cannibalization factor) = $500,000

[2] Artic Cool: $7.9mil. Retail Sales of Microfiber/$19.75 AUR/400,000units/$5.0 wholesale margin = $2,000,000 * 25% (MP cannibalization Factor) = $500,000

[3] 2016 Net Profit damages are estimated, and assume, for the sake of this claim, that Mission's exclusive rights to the Debtor's intellectual property through July 1, 2016 have been rejected in this bankruptcy.

[4] Total damages are estimated and subject to revision. Damages assume, for the sake of this claim, that Mission's exclusive rights to the Debtor's intellectual property through July 1, 2016 have been rejected in this bankruptcy. Mission has initiated an appeal of the Bankruptcy Court's Order [D.E. 240] regarding Mission's exclusivity rights pursuant to 11 U.S.C. § 365(n); Mission reserves the right to amend this claim to request that a portion of the above damages be paid as an administrative expense herein.

[Exhibit C]

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Bk. No. 15-11400 (JMD)
Chapter 11

IN RE OLD COLD, LLC

Debtor,

STIPULATED ORDER CONCERNING STAY OF CERTAIN MATTERS

Old Cold, LLC (the "Debtor"), Schleicher & Stebbins Hotels L.L.C. ("S&S") and Mission Product Holdings, Inc. ("Mission"), are parties to various disputed matters. As stated at the hearing held on January 26, 2016, the Debtor, S&S and Mission have agreed to stay these matters pending the resolution of Mission's appeals of this Court's (i) Memorandum and Order Granting 365(n) Motion each dated November 12, 2015 (the "365(n) Order Appeal") and (ii) Memorandum and Order Granting Sale Motion each dated December 18, 2015 (the "Sale Order Appeal").

Accordingly, the parties have stipulated to a stay of the following matters effective January 26, 2016 (the "Stayed Matters"):

1. Debtor's Objection to Claim Filed By Mission Product Holdings Pursuant to Section 502 of the Bankruptcy Code [Docket No 313], including all discovery related thereto;

2. All matters pending in the Adversary Proceeding (Adv. Proc No. 16-01001 (JMD)), *Old Cold, LLC and Schleicher & Stebbins Hotels L.L.C v. Mission Product Holdings, Inc.*; and

3. All matters pending in the United States District Court for the Southern District of New York (Case No. 15-cv-09785 (VEC)), *Mission Product Holdings, Inc. v. Schleicher & Stebbins Hotels, L.L.C.*

The stay of the Stayed Matters shall continue until the Bankruptcy Appellate Panel's issuance of decisions on both the 365(n) Order Appeal and the Sale Order Appeal. Upon the issuance of a decision on the last of these of two appeals, the agreement to stay all the Stayed Matters shall terminate and the parties shall request a status conference on the Stayed Matters pending before this Court.

Notwithstanding the foregoing, the agreement to stay the Stayed Matters may be terminated by: (1) agreement of all parties or (2) by Order of this Court. If a party seeks to terminate the stay over the objection of another party, the moving party shall file a motion to terminate the stay and any response thereto shall be filed within 14 business days or such other time established by the Court. Whether the stay is terminated by agreement or otherwise, the Court shall schedule a status conference on the Stayed Matters pending before this Court.

Until such time as the Court holds a status conference or orders otherwise, all pending or applicable deadlines in the Stayed Matters pending before this Court shall remain stayed, including any and all discovery.

S&S and Mission shall cooperate in Mission's obtaining or informing the Court in the New York action of the agreed stay of the matter on substantially the same terms set forth herein.

All parties have reserved all of their rights in the Stayed Matters, including jurisdiction arguments that have been or could be raised.

Date: February 03, 2016

/s/ J. Michael Deasy
Hon. J. Michael Deasy
U.S. Bankruptcy Judge

TEMPNOLOGY, LLC MOOTNESS LETTER, 1ST CIR. ENTRY ID 6118629, FILED SEPTEMBER 8, 2017

[Nixon Peabody letterhead]

September 8, 2017

Hon. William J. Kayatta, Jr.
United States Court of Appeals
For the First Circuit
c/o Margaret Carter, Clerk
John Joseph Moakley United States Courthouse
1 Courthouse Way, Suite 2500
Boston, MA 02210

Re: In re Tempnology, LLC, n/k/a Old Cold, LLC: Mission Product Holdings, Inc. Appellant v. Tempnology, LLC, n/k/a Old Cold, LLC, No. 16-9016

To the Honorable William J. Kayatta, Jr.:

As ordered by the Court on August 30, 2017, Appellee Old Cold, LLC ("Appellee") submits this letter to address the issue of whether all exclusivity and trademark rights that might have been held by Appellant Mission Product Holdings, Inc. ("Appellant"), even if preserved under 11 U.S.C. § 365(n), have now expired, rendering the disputes in the instant appeal moot, given that the Wind-Down Period (as defined below) of the Co-Marketing and Distribution Agreement (the "Agreement") expired on July 1, 2016. While Appellee does not concede that the Appellant has any rights in the trademarks post-rejection, as discussed below, Appellee maintains that, regardless, the appeal has been made moot by the expiration of the Agreement by its terms. Additionally, the impact of the Court's inability

to grant meaningful relief following the now-more-than-year-old termination of the Agreement is made greater given that Appellant expressly stated in April 2015 that it would not order any product from the Appellee, a statement that was made manifest in the Appellant's conduct over the balance of the Agreement during which time it ordered not one dollar's worth of product from the Appellee. The Appellant has no rights remaining post-termination and can demonstrate no damages given that it stopped performing under the now-terminated Agreement more than two years before termination. There is no justiciable controversy before the Court because the Court cannot, on appeal, grant any meaningful relief to the Appellant.

A. Contractual Relation Between the Parties.

On or about November 21, 2012, the Appellee and Appellant entered into the Agreement. *Appendix*, p. 35-78.[1] By the Agreement, the Appellee granted Appellant distribution rights within the United States (the "Territory") for certain of the Appellee's products (the "Cooling Accessories") as set forth on Schedule A to the Agreement. *See id.* p. 36-38. Pursuant to Section 1 and Schedule A, the Appellee granted Appellant exclusive distribution rights within the Territory to a subset of the Cooling Accessories and non-exclusive distribution rights with respect to the balance of the Cooling Accessories. *See id.* and at p. 162.

The Agreement also granted Appellant certain limited non-exclusive rights to distribute the Cooling Accessories outside the United States subject to certain pre-existing third-party licenses.

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[1] All references to the Appendix are to documents submitted to this Court on appeal.

See id.

> By the Agreement, the Appellee also granted Appellant:
> a non-exclusive, irrevocable, royalty free, full paid-up, perpetual, worldwide, fully-transferable license ... to use ...and otherwise freely exploit the CC Property (excluding Marks and Domain names) in any manner for the benefit of [Appellant] ...

See id. p. 51-52.

> Section 15(b) of the Agreement defines "CC Property" to mean:
> Personal products, inventions, designs, discoveries, improvements, innovations, ideas, drawings, images, works of authorship, formulas, methods, techniques, concepts, configurations, compositions of matter, packaging, labeling, software applications, databases, computer programs as well as other creative content, methodologies and materials in existence prior to this Agreement ....

See id.

The Agreement expressly carves out the Appellee's trademarks and trade names from the definition of CC Property that is the subject of the license granted to Appellant under Section 15(b). *See id.*

> In Section 15(d) of the Agreement, the Appellee also granted Appellant:
>
> a non-exclusive, non-transferable limited license, which shall expire upon the Termination of this Agreement ... to use its Coolcore trademark and logo (as well as any other Marks licensed hereunder) for the limited purpose of

> performing its obligations hereunder, exercising its rights and promoting the purposes of this Agreement as contemplated herein ....

See id. p. 53 (emphasis supplied).

B. Termination of the Agreement.

On or about June 30, 2014 Appellant purported to exercise its right to terminate the Agreement without cause which triggered a two-year wind down period during which, though terminated, the Agreement would remain in full force and effect and enforceable by and between the parties (the "Wind Down Period").

On July 22, 2014, citing certain breaches of the Agreement by Appellant, the Appellee issued its own notice of termination to Appellant. The parties, pursuant to the Agreement, then commenced a two-part arbitration process to resolve their cross claims of breach against one another.

At the end of the first phase of the arbitration process, the arbitrator issued a ruling (the "Partial Final Award") that, among other things, held that "the Agreement remains in full force and effect...." but would terminate at the end of the Wind Down Period, or by June 30, 2016.

Therefore, the Agreement terminated by its own terms more than a year ago, and before the current appeal was taken by Appellant.

In anticipation of filing its chapter 11 plan, on September 3, 2015, Appellee moved to reject the Agreement in the bankruptcy case (the "Rejection Motion"). On September 11, 2015, Mission filed its Objection to the Rejection Motion and Sale Motion (the "Opposition") arguing, among other things, that, by making an election under Section 365(n), it retained certain rights

under the Agreement post-rejection as a non-debtor licensee. On September 21, 2015, the Bankruptcy Court entered an omnibus order (the "Rejection Order") on the Rejection Motion, authorizing the Debtor's rejection of certain executory contracts but deferring a determination on the Debtor's proposed rejection of the Agreement with Mission pending further hearing and briefing. At that hearing on the Rejection Motion, Mission consented to that rejection as long as the preservation of their 365(n) rights were preserved. Regardless, any rights of the Appellee that were preserved expired by their own terms on June 30, 2016 at the end of the Wind-Down Period. The Bankruptcy Code and the relevant case law are clear that 365(n) merely serves to protect existing rights, but does not give a licensee greater rights then it is afforded under the governing contract. Here those rights expired 15 months ago.

C. Appellant's Lack of Measurable Damages

Not only has the Agreement now been terminated for more than a year, but Appellant neither ordered nor sold any of the subject goods under the Agreement for more than two years leading up to the termination of the June 2016 Agreement. In a letter dated April 16, 2015, Appellant, through Joshua Shaw, advised the Appellee that it would not order any products from the Appellee during 2015. The statement was made manifest by Appellant's conduct thereafter. In 2014, the Appellee received approximately **$5 million** in revenues from Appellant. In the calendar years 2015 and 2016, those revenues were **$0.00** through the date of termination. Accordingly, Appellant's claims arising from alleged breaches of the Agreement, to the extent not mooted by last year's termination, should be barred in their entirety because the Appellant cannot prove any damages.

Given the lack of damages and the absence of a viable agreement post-termination, Appellant is essentially looking to this Court to issue an advisory opinion on the scope of 11 § 365(11). The Court should refrain from engaging in such an exercise given that the Court cannot grant meaningful relief based on the current status of the parties' relationship.

D. The Matter is Constitutionally Moot.

Article III, or constitutional mootness, derives from the constitutional requirement that judicial power be exercised only in "cases" or "controversies." *De Funis v. Odegaard*, 416 U.S. 312 (U.S. 1974), (in essence, asking "whether it is a claim that may be resolved by the courts"); *Powell v. McCormack*, 395 U.S. 486, 496 n.7 (1969); *Liner v. Jafco*, 375 U.S. 301, 306 n. 3 (1964). The dispute must concern "live" issues, and generally, the plaintiff must have a personal interest in the outcome of the case. *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990). The Supreme Court has described mootness as follows:

> The "personal stake" aspect of mootness doctrine ... serves primarily the purpose of assuring that federal courts are presented with disputes they are capable of resolving. One commentator has defined mootness as "the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the[10] litigation (standing) must continue throughout its existence (mootness)."

United States Parole Comm'n v. Geraghty, 445 U.S. 388, 397 (1980), quoting Henry P. Monaghan, Constitutional Adjudication: The Who and When, 82 YALE L. J. 1363, 1384 (1973).

When a legal claim becomes moot while awaiting appellate review, the established practice is for the federal appeals court to reverse or vacate the judgment below and to remand the case to the district court with an instruction to dismiss the action. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 71 (1997), quoting *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). That consequence is because a moot case does not qualify as a "case or controversy" under Article III; due to the lack of jurisdiction, federal courts have no power to consider the merits of a constitutionally moot case. *Powell v. McCormack*, 395 U.S. 486, 496 n.7 (1969).

As set forth above, this appeal clearly does not present a justiciable issue. The Agreement has long since terminated by its terms. Any exclusivity and trademark rights that might have been held by Appellant at one time under the Agreement no longer exist. Moreover, even for the purposes of establishing damages for the pre-termination period, the Appellant's own actions render that effort moot because it simply failed to perform under the Agreement, ordering no product from the Appellee for the two year period leading up to te1mination at the end of the Wind Down Period.

Very truly yours,

/s/ Daniel W. Sklar
Daniel W. Sklar

ORDER GRANTING CREDITOR SCHLEICHER & STEBBINS HOTELS, LLC MOTION FOR RELIEF FROM STAY, BANKR. DKT. 552, FILED SEPTEMBER 19, 2018

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE

Bk. No. 15-11400-CJP
Chapter 11

IN RE OLD COLD, LLC,
Debtor(s),

ORDER OF THE COURT — MOTION FOR RELIEF

Hearing Date: 09/18/2018 01:00 pm

Nature of Proceeding:

Doc# 521 Assented to Motion for Relief from Stay Filed by Creditor Schleicher & Stebbins Hotels, L.L.C.

Outcome of Hearing:

Upon consideration of the further briefing submitted by the parties and the entire record of this case, the Court having determined that submission of additional evidence was not necessary given the extensive record in this matter, including the final orders supporting the relief requested, for the reasons stated on the record at the hearing held on September 18, 2018, the Objection [Doc# 528] and Omnibus Response [Doc# 549] filed by Mission Product Holdings, Inc. are OVERRULED and the

Motion for Relief [Doc# 521] filed by Schleicher & Stebbins Hotels, L.L.C., and assented to by the Debtor, is GRANTED.

In accordance with Fed. R. Bankr. P. 4001(a)(3), the Court hereby stays this Order through and including October 22, 2018.

IT IS SO ORDERED:

/s/ Christopher J. Panos Dated: 09/19/2018
Christopher J. Panos
United States Bankruptcy Judge

ORDER REGARDING MOTION OF MISSION PRODUCT HOLDINGS, INC. FOR EXTENSION OF STAY OF EFFECTIVENESS OF ORDER OF THE COURT OR, IN THE ALTERNATIVE, STAY PENDING APPEAL, BANKR. DKT. 577, FILED OCTOBER 31, 2018

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE

Bk. No. 15-11400-CJP
Chapter 11

IN RE OLD COLD, LLC,
Debtor,

ORDER REGARDING MOTION OF MISSION PRODUCT HOLDINGS, INC. FOR EXTENSION OF STAY OF EFFECTIVENESS OF ORDER OF THE COURT AT D.E. 552 OR, IN THE ALTERNATIVE, STAY PENDING APPEAL (D.E. 573)

Before the Court is the *Motion for Extension of Stay of Effectiveness of Order of Court at D.E. 552 or, in the Alternative, Stay Pending Appeal* (D.E. 573) (the "Motion"), pursuant to which Mission Product Holdings, Inc. ("Mission") seeks an extension of the stay of the effectiveness of the Court's Order (D.E. 552) (the "Order") granting the *Assented to Motion for Relief* (D.E. 521) (the "Stay Relief Motion") filed by Schleicher & Stebbins Hotels, LLC ("S&S") or, in the alternative, a stay of the Order pending appeal. After due deliberation, it is hereby ORDERED, ADJUDGED,

and DECREED that the Motion is DENIED IN PART as follows.

I. Background

After a hearing held on September 18, 2018 on the Stay Relief Motion (the "Hearing"), this Court entered the Order, determining that S&S has met its burden under 11 U.S.C. § 362(d)(2) and that relief from stay was warranted under the circumstances based on, among other things, the extensive record in this case and the fact that hearings on motions for relief from stay are summary proceedings. *See Grella v. Salem Five Cent Sav. Bank*, 42 F.3d 26, 32 (1st Cir. 1994). As stated on the record at the Hearing, the Court concluded that a greater record was not required to resolve the Stay Relief Motion and S&S had demonstrated a colorable claim to property of the estate based on valid liens covering the remaining cash in the estate of the debtor, Old Cold, LLC (the "Debtor"). *See* Sept. 18, 2018 Hr'g Tr. (D.E. 562) (the "Hr'g Tr."), 88:6–14; *see also Grella*, 42 F.3d at 32. The Court overruled Mission's opposition to the Stay Relief Motion (D.E. 528) (the "Stay Relief Objection") in its entirety, including with respect to Mission's position that (i) S&S either recontributed assets to the Debtor's estate free and clear of its liens or waived any lien with respect to the excluded sale assets and (ii) the Court was divested of jurisdiction to consider the Stay Relief Motion (the "Divestiture Argument") given the pendency of the Petition for Certiorari [S. Ct. Docket No. 17-1657] (the "Petition") before the United States Supreme Court. *See* Hr'g Tr. 86:20-88:5.

The Court initially stayed the effectiveness of the Order through and including October 22, 2018. *See* Ord. (D.E. 552). Mission filed a Notice of Appeal (D.E. 555)

on October 1, 2018, appealing the Order to the Bankruptcy Appellate Panel for the First Circuit (the "BAP").

With the assent of S&S, Mission sought a further extension of the stay of effectiveness of the Order (D.E. 567) (the "Assented to First Extension Motion") because the Supreme Court had not yet taken action on Mission's Petition. On October 19, 2018, this Court granted the Assented to First Extension Motion and entered an order which (a) extended the stay of the effectiveness of the Order through and including November 5, 2018 and (b) alternatively, to the extent that it were determined that the Court lacked jurisdiction to modify the Order because of the Notice of Appeal, construed the Assented to First Extension Motion as an assented to motion for limited stay pending appeal, which the Court granted, in either case without prejudice to Mission's ability to seek (and other parties' ability to oppose) further extensions of the effectiveness of the Order. *See* Ord. (D.E. 568).

On October 26, 2018, the Supreme Court granted the Petition only with respect to Question 1 of the two questions presented on appeal of the First Circuit's decision in *Mission Product Holdings, Inc. v. Tempnology, LLC n/k/a Old Cold, LLC (In re Tempnology, LLC n/k/a Old Cold LLC)*, 879 F.3d 389 (1st Cir. 2018) (the "Supreme Court Appeal"): "[w]hether, under §365 of the Bankruptcy Code, a debtor-licensor's 'rejection' of a license agreement—which 'constitutes a breach of such contract,'11 U.S.C. §365(g)—terminates rights of the licensee that would survive the licensor's breach under applicable nonbankruptcy law." Cert. Pet. [S. Ct. Doc. No. 17-1657]. The Supreme Court denied certiorari with respect to Question 2 of the Petition: "Whether an exclusive right to sell certain products practicing a pa-

tent in a particular geographic territory is a 'right to intellectual property' within the meaning of §365(n) of the Bankruptcy Code." *Id.*

In the Motion, Mission requests that this Court extend the stay of the effectiveness of the Order through and including an issuance of a ruling in the Supreme Court Appeal or, in the alternative, stay the Order pending its appeal. S&S did not assent to the Motion.

II. Discussion

i Divesture and Jurisdiction

Mission asserts that this Court did not have jurisdiction to act on the Stay Relief Motion because of the Petition and seeks to stay the effectiveness of the Order pending appeal on that issue, acknowledging, however, that "effectiveness of the Order would not moot the appellate rights at issue in the Supreme Court's consideration of Question 1[.]" Mot. ¶ 11. Mission instead argues that its ability to recover against the remaining estate funds would be prejudiced. *See id.*

In sum, the divestiture doctrine provides that the filing of an appeal divests a bankruptcy court of control over the issue or matter that is on appeal. "During the pendency of an appeal of a bankruptcy court order, however, the bankruptcy court is not divested of jurisdiction to enforce or implement the order being appealed, nor is the bankruptcy court divested of jurisdiction to decide issues and proceedings different from and collateral to those involved in the appeal." *In re Sabine Oil & Gas Corp.*, 548 B.R. 674, 679 (Bankr. S.D.N.Y. 2016) (internal quotations and citations omitted).

For the same reasons stated on the record at the Hearing, the Court again concludes that it possessed jurisdiction to enter the Order. The issues that are the

subject of the Petition do not have sufficient nexus to the issues determined by this Court in the Order to divest this Court of jurisdiction. The Court also concludes that it possesses jurisdiction to further stay the effective date of the Order and its implementation, which will not affect in any way the issues that are the subject of the pending appeal of the Order to the BAP.

ii. Denial of Stay Request and Limited Relief

Mission asserts that the Court should stay the Order pending its appeal. Rule 8007(a)(1)(A) of the Federal Rule of Bankruptcy Procedure (the "Rules") provides that a party may move for "stay of a judgment, order, or decree of the bankruptcy court pending appeal" and that "[o]rdinarily, a party must move first in the bankruptcy court for [such] relief." Fed. R. Bankr. P. 8007(a)(1)(A). Thus, Rule 8007 recognizes the potential for a subsequent request for a stay pending appeal made to the BAP or district court if the appellant is unsuccessful at the bankruptcy court. *See id.*

The standard governing the issuance of a stay pending appeal is well settled. The United States Court of Appeals for the First Circuit has recognized that a party moving for stay pending appeal must satisfy the traditional, four-part standard applicable to preliminary injunctions in determining whether to grant a stay pending appeal, which consists of the following factors: "(1) whether the applicant has made a strong showing of success on the merits; (2) whether the applicant will be irreparably harmed absent injunctive relief; (3) whether issuance of the stay will injure other parties; and (4) where the public interest lies." *Acevedo–García v. Vera–Monroig*, 296 F.3d 13, 16 n.3 (1st Cir. 2002). "'The *sine qua non* [of the stay pending appeal standard] is whether the [movants] are likely to

succeed on the merits.'" *Id.* (quoting *Weaver v. Henderson*, 984 F.2d 11, 12 (1st Cir. 1993)). Further, "'[w]hat matters ... is not the raw amount of irreparable harm [a] party might conceivably suffer, but rather the risk of such harm in light of the party's chance of success on the merits,'" *P.R. Hosp. Supply, Inc. v. Boston Scientific Corp.*, 426 F.3d 503, 507 n.1 (1st Cir. 2005) (quoting the Massachusetts standard, which "closely tracks the federal standard"). "In essence, the issuance of a stay depends on 'whether the harm caused [movant] without the [stay], in light of the [movant's] likelihood of eventual success on the merits, outweighs the harm the [stay] will cause [the non-moving party].'" *Acevedo-García*, 296 F.3d at 16–17 (quoting *United Steelworkers of Am. v. Textron, Inc.*, 836 F.2d 6, 7 (1st Cir. 1987)). While a motion for stay pending appeal is an extraordinary remedy and requires a substantial showing on the part of the movant, "'[t]hese factors are not to be applied in a vacuum but instead must be viewed in light of the importance of the right of appeal and preservation of the status quo during the appeal.'" *In re Miraj & Sons, Inc.*, 201 B.R. 23, 26 (Bankr. D. Mass. 1996) (quoting *In re Howley*, 38 B.R. 314, 315 (Bankr. D. Minn. 1984)).

Upon consideration of the stay pending appeal factors and having reviewed the entire record of proceedings concerning the Order, the Court determines that Mission is unable to meet all four prongs of the test to implement a stay pending appeal of the Order as it is unlikely to succeed on the merits of an appeal. The fact that the Supreme Court has now granted the Petition on an issue not directly related to the Stay Relief Motion is not relevant to the Court's rulings on the record in relation to the Order.

While the Court declines to enter a stay pending appeal under Rule 8007, the Court has determined that it has jurisdiction to further stay the effective date of the Order and its implementation. To facilitate an orderly process for the parties to seek a stay pending appeal from the BAP, the Court will extend the stay of the effectiveness of the Order (D.E. 552) until **November 9, 2018**. If Mission files a motion for stay pending appeal with the BAP prior to that date, the effectiveness of the Order shall be stayed without further order of this Court until **November 28, 2018**.

III. Conclusion

After considering the history of this case, the amount of time that passed prior to S&S filing the Stay Relief Motion, the relative prejudice to the parties, and judicial economy and efficiency, the Court concludes that a brief further stay of the effectiveness of the Order is appropriate to allow the parties to seek a stay pending appeal from the BAP and to oppose any such request. Since the Court has denied the request for a stay pending appeal, it declines to address the issue of whether Mission should be required to post a bond. Accordingly, the Motion is DENIED except for the limited relief set forth above.

Dated: October 31, 2018 By the Court,

/s/ Christopher J. Panos
Christopher J. Panos
United States Bankruptcy Judge

No. 17-1657

IN THE

Supreme Court of the United States

MISSION PRODUCT HOLDINGS, INC.,
Petitioner,

v.

TEMPNOLOGY, LLC, N/K/A OLD COLD LLC,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether, under §365 of the Bankruptcy Code, a debtor-licensor's "rejection" of a license agreement—which "constitutes a breach of such contract," 11 U.S.C. §365(g)—terminates rights of the licensee that would survive the licensor's breach under applicable non-bankruptcy law.

PARTIES TO THE PROCEEDING

Petitioner is Mission Product Holdings, Inc. Mission has no parent company and no publicly held company owns 10% or more of its stock.

Respondent is Tempnology, LLC, n/k/a Old Cold LLC.

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IN THE

Supreme Court of the United States

No. 17-1657

MISSION PRODUCT HOLDINGS, INC.,
Petitioner,

v.

TEMPNOLOGY, LLC, n/k/a OLD COLD LLC,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR PETITIONER

INTRODUCTION

This case arises from a licensing agreement between petitioner Mission Product Holdings, Inc. and respondent Tempnology, LLC.[1] The agreement gave Mission the right to sell Tempnology's patented products and use its trademarks worldwide, along with the exclusive right to sell a subset of those patented and trademarked products in the United States. Tempnology later decided that it wanted out of the agreement. After its pretextual attempts to terminate the agreement outside bankruptcy failed, Tempnology filed a

[1] Tempnology, LLC is now known as Old Cold LLC. For simplicity, we refer to it as "Tempnology."

Chapter 11 bankruptcy petition, openly avowing that its goal was to revoke the license it had granted Mission and make a better deal with other licensees. It filed and obtained approval of a motion to "reject" the license agreement under §365 of the Bankruptcy Code, which permits a trustee or debtor-in-possession, on behalf of the bankruptcy estate, to "assume or reject any executory contract of the debtor," §365(a).[2]

The question presented here is what effect rejection of the parties' license agreement had on Mission's rights under the agreement. The text of the Bankruptcy Code provides the answer: "[R]ejection ... constitutes a breach" of the rejected contract "immediately before the date of the filing of the petition." §365(g)(1). That is rejection's *only* effect on the rights of the counterparty to the rejected agreement: It gives rise to a breach-of-contract claim by the counterparty against the debtor, determined according to applicable nonbankruptcy law and paid in the bankruptcy case. *Id.*; §§502(b)(1), 502(g)(1).

As the great majority of courts and scholars have recognized, rejection is not a special bankruptcy power to terminate or rescind a contract. It does not give the debtor any more rights than the breaching party to a contract would have outside bankruptcy. Nor does it allow the trustee to revoke interests in property that the debtor granted to a counterparty under the contract before bankruptcy. Yet that is precisely what the First Circuit held in this case, concluding that rejection of the parties' license agreement entitled Tempnology to do what it could not do outside bankruptcy: take

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[2] Statutory citations are to 11 U.S.C. (the Bankruptcy Code) unless otherwise indicated.

back the license it granted Mission before bankruptcy and relicense its intellectual property to others.

That reading of §365 disregards its text, its context, and the fundamental bankruptcy principles they reflect. Section 365 recognizes that every executory contract is both an asset and a liability: The right to receive the counterparty's performance under the contract is an asset, while the debtor's obligation to perform is a liability. Under §365, the trustee can weigh the benefit to the estate of receiving performance against the cost to the estate of performing. If a contract provides a net benefit to the estate, the trustee will assume it, and the estate will step into the debtor's shoes and perform the debtor's future obligations. Otherwise, the trustee will reject the contract.

Neither assumption nor rejection changes the contract in any way: If a contract is assumed, the estate has all the same obligations the debtor had outside bankruptcy, and the counterparty can enforce those obligations against the estate. If a contract is rejected, those obligations simply remain the debtor's and will thus remain unperformed. Like an anticipatory repudiation outside bankruptcy, rejection announces that the counterparty will not receive the performance it is owed under the contract. It therefore constitutes a breach. The breach is deemed to occur before bankruptcy so that the counterparty can assert a claim against the debtor in the bankruptcy case. Otherwise, breach by rejection is no different than breach outside bankruptcy and has precisely the same consequences, consistent with the "'basic federal rule' in bankruptcy ... that state law governs the substance of claims." *Travelers Cas. & Sur. Co.* v. *Pacific Gas & Elec. Co.*, 549 U.S. 443, 450 (2007).

Outside bankruptcy, of course, the breaching party to a contract could not declare the contract terminated or rescind the other party's rights by virtue of its own breach. Nor could it take back an interest in property that the contract had already conveyed to the other party. There is no basis, textual or otherwise, for a different result in bankruptcy. To the contrary, it is settled law that—absent a successful suit by the trustee under the Bankruptcy Code's avoidance provisions, which did not occur here—the bankruptcy estate cannot have any greater rights in property than the debtor itself did outside bankruptcy. *Board of Trade of City of Chicago* v. *Johnson*, 264 U.S. 1, 14-15 (1924).

Consider a lease of real property. Outside bankruptcy, a landlord that breaches a lease, say by neglecting to maintain the property, does not thereby acquire the right to evict the tenant. The same is true in bankruptcy. The trustee may choose to reject the lease; if so, the estate is not required to perform the debtor's future obligations, such as maintenance, under the lease. The tenant thus has a claim against the debtor in the bankruptcy for any damages resulting from the failure to maintain the property. But the trustee cannot evict the tenant. Nor can rejection bring the tenant's leasehold interest, conveyed by the debtor to the tenant before bankruptcy, into the estate.

License agreements are no different. No one contends that, outside bankruptcy, Tempnology's breach of the license agreement would have permitted it to revoke the license. Rejection of the license agreement in bankruptcy does not entitle Tempnology to anything more. It certainly does not enable Tempnology to avoid its pre-bankruptcy transfer of rights in its intellectual property to Mission. Simply put, rejection does not "let a licensor take back ... rights it bargained away. Th[at]

makes bankruptcy more a sword than a shield, putting debtor-licensors in a catbird seat they often do not deserve." *In re Exide Tech.*, 607 F.3d 957, 967-968 (3d Cir. 2010) (Ambro, J., concurring).

OPINIONS BELOW

The First Circuit's opinion (Pet. App. 1a-34a) is reported at 879 F.3d 389. The bankruptcy appellate panel's opinion (Pet. App. 35a-65a) is reported at 559 B.R. 809. The bankruptcy court's opinion (Pet. App. 69a-81a) is reported at 541 B.R. 1. The bankruptcy court's orders (Pet. App. 67a-68a, 83a-84a) are unpublished.

JURISDICTION

The First Circuit entered judgment on January 12, 2018. Pet. App. 1a. This Court granted an extension of time to file a petition for certiorari until June 11, 2018. Petitioner filed a timely petition on that date, which this Court granted on October 26, 2018. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

Section 365 of the Bankruptcy Code is reproduced in full in the statutory addendum to this brief.

STATEMENT

A. Mission's Licensing Agreement With Tempnology

1. Debtor Tempnology developed chemical-free cooling fabrics on which it held issued and pending patents. Pet. App. 2a-3a, 36a. It produced clothing and accessories like towels, socks, and headbands that were designed to remain cool when used during exercise. *Id.*

2a. Tempnology marketed these products using the COOLCORE and DR. COOL trademarks. *Id.*

On November 21, 2012, Tempnology executed a licensing agreement (the "Agreement") with Mission. Pet. App. 3a, 36a. The Agreement granted Mission a non-exclusive, worldwide, perpetual license to use for any purpose (including manufacture and sale) all of Tempnology's products, inventions, technology, and designs and all of Tempnology's intellectual property rights (excluding trademarks) with respect to the foregoing. JA234-235 (Agreement §15(b)). It also granted Mission a non-exclusive, worldwide (except for certain countries in East Asia) license to use Tempnology's trademarks on the Tempnology products Mission sold (the "Cooling Accessories") for the term of the Agreement. JA237-238 (Agreement §15(d)).

The Agreement also carved out a territory for Mission—primarily consisting of the United States—in which Mission had the exclusive right to sell certain products practicing Tempnology's patents and bearing its trademarks, including towels, wraps, and hoodies (the "Exclusive Cooling Accessories"), for the term of the Agreement. JA203-205, 211-218, 256-257 (Agreement §§1(A)-(B), 5-6). Tempnology agreed that, within Mission's exclusive territory, it would not sell the Exclusive Cooling Accessories itself or license others to sell them. JA211-218 (Agreement §§5-6).

Thus, as relevant here, the Agreement gave Mission two distinct licenses: a non-exclusive worldwide license to use Tempnology's trademarks (the "non-exclusive trademark rights") and an exclusive license to sell certain products practicing Tempnology's patents

and bearing its trademarks within the United States (the "exclusivity rights").[3]

2. The Agreement provided that Tempnology would supply finished Cooling Accessories to Mission, which was required to order a minimum number of products from Tempnology. JA219-227, 240, 248-249 (Agreement §§8-10, 16, 23). If Mission did not meet those minimum requirements, it would lose its exclusivity rights, JA219-221 (Agreement §8(a)-(c)), and if Mission did not meet the minimum requirements during the initial term of the Agreement, Tempnology would be entitled to terminate the Agreement for cause, JA207-209, 220-221 (Agreement §§3, 8(c)).

The Agreement also provided, however, that if Tempnology did not fill any of Mission's purchase orders in a timely manner, Mission would be entitled to source and manufacture the Cooling Accessories itself, rather than purchasing them from Tempnology. JA220-225, 230-232 (Agreement §§8(c), 9, 14). In that event, Mission would not be obligated to meet the minimum purchase requirements. JA220-221 (Agreement §8(c)).

Either party could terminate the Agreement without cause, triggering a two-year wind-down period during which the Agreement would remain in effect. JA207-211 (Agreement §§3-4). Moreover, if either party failed to cure a material breach, the other party could terminate the Agreement for cause, ending the Agreement immediately with no wind-down period. JA207-209 (Agreement §3).

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[3] The parties agreed that the non-exclusive, worldwide patent license survived rejection (Pet. App. 6a), and it is not at issue here.

3. In June 2014, Mission exercised its right to terminate the Agreement without cause, triggering the two-year wind-down period. Pet. App. 4a. The next month, Tempnology purported to terminate the Agreement for cause. *Id.* Tempnology did not claim that Mission had failed to satisfy the Agreement's minimum purchase requirements (since Mission had met those requirements). Dkt. 455 at 17, *In re Old Cold, LLC*, No. 15-11400 (Bankr. D.N.H.) ("Bankr. Dkt."). Rather, Tempnology asserted that Mission's hiring of Tempnology's former president seven months earlier violated the Agreement. JA297-299.

In August 2014, Mission placed an order for towels from Tempnology. JA309. Tempnology refused to fill the order, asserting that the Agreement was no longer in effect. *Id.* In October 2014, Tempnology demanded that Mission stop using its trademarks, asserting that Mission's use was unauthorized. JA307-310. Mission filed a demand for arbitration on the basis that Tempnology had breached the Agreement by improperly purporting to terminate it and refusing to fill Mission's purchase orders. JA294-295.

In June 2015, the arbitrator ruled that Tempnology's purported termination for cause was improper and that the Agreement remained in effect through the wind-down period—until July 1, 2016. Pet. App. 4a-5a; JA298-307, 311. Moreover, the arbitrator held that Tempnology's actions constituted a repudiation of the Agreement, relieving Mission from its obligation under the Agreement to purchase products from Tempnology. JA307-311. The arbitrator set a second phase of the arbitration to address unresolved issues, including any damages claim by Mission. JA311.

4. During the arbitration proceedings, Tempnology sought to relicense the intellectual property it had licensed to Mission under the Agreement to third parties within Mission's exclusive territory. In November 2014, Tempnology licensed Paramount Apparel International, Inc. to sell Tempnology's cooling towels—an Exclusive Cooling Accessory—in the United States. JA569. In February 2015, Tempnology similarly licensed Disney to sell Tempnology's cooling towels in the United States. *Id.*; *see also* JA556.

B. Tempnology's Bankruptcy And Rejection Of The Agreement

1. On September 1, 2015, after Tempnology's attempt to terminate the Agreement outside bankruptcy had failed, Tempnology filed a Chapter 11 petition, which halted the arbitration proceedings. Pet. App. 5a; *see* §362(a)(1).

The next day, Tempnology moved to reject the Agreement under §365(a). Pet. App. 5a. Tempnology explained that it filed for bankruptcy in large part because "absent a rejection of the ... Agreement, [Tempnology] is prohibited from selling all of the contract exclusive products in the U.S. ... until June 2016." JA321-323; *see* Pet. App. 6a. Tempnology sought to reject the Agreement to free itself from Mission's rights under the Agreement, which it claimed had "hinder[ed] [its] ability to derive revenue by other marketing and distribution opportunities." Bankr. Dkt. 35 at 4; *see* Bankr. Dkt. 122 at 7 (urging rejection so that Tempnology could "market and sell its products to third parties" in Mission's exclusive territory).

Mission objected to the rejection motion. Pet. App. 6a. It also elected to retain its rights to intellectual

property protected by §365(n), which provides that "[i]f the trustee rejects an executory contract under which the debtor is a licensor of a right to intellectual property, the licensee under such contract may elect ... to retain its rights ... under such contract ... to such intellectual property." §365(n)(1); *see* Pet. App. 6a. The bankruptcy court granted Tempnology's rejection motion, but noted that its order was "subject to Mission['s] election to preserve its rights under ... §365(n)." Pet. App. 83a-84a.

In response, Tempnology filed a motion asking the bankruptcy court to determine the scope of the rights Mission would retain after rejection of the Agreement. Pet. App. 6a. The bankruptcy court held that, under §365(n), Mission retained its non-exclusive, worldwide license to use Tempnology's patents post-rejection. The court concluded, however, that rejection of the Agreement terminated Mission's non-exclusive trademark license and exclusivity rights. Pet. App. 78a-81a.

2. Tempnology's controlling shareholder, Schleicher & Stebbins Hotels L.L.C. ("S&S"), then agreed to purchase substantially all of Tempnology's assets, including its intellectual property. JA404-405, 411-412, 460-461. S&S agreed to pay all unsecured claims against Tempnology in full, except for certain disputed claims, including Mission's rejection damages claim. JA344-347, 411-412, 427-429, 461-462, 540-541. The sale closed on December 18, 2015. JA542.

3. Although the Agreement was rejected as of the bankruptcy petition date (September 1, 2015), Pet. App. 83a-84a, it remained in effect for nearly another year, until expiration of the wind-down period on July 1, 2016. Tempnology and S&S continued to violate Mission's trademark and exclusivity rights during this post-

rejection, pre-termination period, including by selling—and licensing multiple additional third parties to sell—the Exclusive Cooling Accessories in Mission's exclusive territory. JA568-570 (Mission letter brief to First Circuit) (citing contracts with Paramount, Disney, Imperial Hats, Academy, Target, and Home Depot).

Mission filed an initial claim for over $4 million for the estimated damages resulting from Tempnology's violations of Mission's rights under the Agreement. JA556-557. Mission reserved the right to amend its damages claim following formal discovery and to assert an administrative claim for damages incurred after the bankruptcy filing if the courts ultimately held that its rights survived rejection. JA557, 570-573; Bankr. Dkt. 351 at 1-4. The parties agreed to stay proceedings on Mission's claim pending this Court's resolution of this matter. Bankr. Dkts. 375, 519.

C. Appeal

1. Mission appealed the bankruptcy court's order to the Bankruptcy Appellate Panel for the First Circuit ("BAP"), which affirmed in part and reversed in part. The BAP agreed that Mission did not retain its exclusivity rights post-rejection. Pet. App. 49a-51a. However, it held that rejection did not eliminate Mission's non-exclusive trademark rights, following the reasoning of the Seventh Circuit in *Sunbeam Products, Inc.* v. *Chicago American Manufacturing, LLC*, 686 F.3d 372 (7th Cir. 2012). Pet. App. 59a.

2. A divided First Circuit disagreed with the BAP in part and affirmed the bankruptcy court. Pet. App. 2a.

Before deciding the merits, the First Circuit requested that the parties address whether the appeal was moot. JA560-561. Tempnology argued that the

appeal was moot because Mission's trademark and exclusivity rights had terminated upon expiration of the wind-down period on July 1, 2016. JA589-595. Mission argued that the appeal was not moot because the treatment of its damages claim for the violation of its rights during the post-rejection, pre-expiration period would turn on the outcome of the appeal. JA562-574. The court rejected Tempnology's mootness argument and reached the merits. Pet. App. 12a-27a.

The panel first held that Mission's exclusivity rights were not protected by §365(n). Pet. App. 12a-19a.[4] It then split 2-1 on the question presented here: whether, absent protection by §365(n), rejection of a license agreement eliminates the rights granted to the licensee, including rights to use the licensed intellectual property. The panel majority reasoned that rejection "converts" all the licensee's rights, including its interests in the intellectual property, "into a pre-petition claim for damages." Pet. App. 22a. Accordingly, the majority held that rejection eliminated Mission's rights under the Agreement that were not expressly protected by §365(n), including its non-exclusive trademark rights. *Id.*[5]

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[4] The second question presented in Mission's petition (at i) sought review of that holding, but this Court denied certiorari on that question.

[5] The panel's holding that rejection eliminates all rights not protected by §365(n) logically encompasses both Mission's non-exclusive trademark rights and its exclusivity rights. As noted in the petition (at 15 n.4), the panel did not separately address the exclusivity rights because it believed (wrongly, in Mission's view) that Mission had waived the argument that rejection did not eliminate its exclusivity rights even if they were not protected by §365(n). Pet. App. 20a. As discussed further below, *see infra* n.11, Tempnology did not raise any waiver argument in its brief in op-

In doing so, the majority followed the Fourth Circuit's widely criticized decision in *Lubrizol Enterprises* v. *Richmond Metal Finishers, Inc.*, 756 F.2d 1043, 1047-1048 (4th Cir. 1985), which held that rejection of a patent licensing agreement enabled the debtor-licensor to take back the rights it had transferred to the licensee under the agreement before bankruptcy. Pet. App. 22a. The majority rejected the Seventh Circuit's contrary decision in *Sunbeam*, opining that *Sunbeam* contravened "Congress's principal aim" in providing for rejection under §365—"'releas[ing] the debtor's estate from burdensome obligations that c[ould] impede a successful reorganization.'" *Id.*

The majority reasoned that it was not "possible to free a debtor from any continuing performance obligations under a trademark license even while preserving the licensee's right to use the trademark," stating that a debtor would be required to "monitor and exercise control over the quality of the goods" produced by the licensee to protect the "continued validity" of its trademarks. Pet. App. 22a-23a. Moreover, recognizing the licensee's continued right to use trademarks, the majority opined, risked "diminishing [the marks'] value to Debtor, whether realized directly or through an asset sale." *Id.* 24a. Accordingly, the majority concluded, rejection terminated Mission's right to use the trademarks. *Id.* 27a.

In dissent, Judge Torruella criticized the majority for "treat[ing] a debtor's rejection as a contract cancellation, rather than a contractual breach." Pet. App. 32a. The BAP, he concluded, "was correct to follow the Seventh Circuit's lead in finding that ... [Tempnology's]

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position, and any issue of waiver with respect to Mission's exclusivity rights should be addressed on remand.

rejection of the executory contract d[id] not rescind the Agreement" and did not "eviscerate any of Mission's remaining trademark rights." *Id.* 33a-34a.

SUMMARY OF ARGUMENT

I. A debtor-licensor's rejection of a contract under §365 of the Bankruptcy Code does not rescind the agreement or revoke the counterparty's rights. Section 365(g) specifies that rejection "constitutes a breach" of the rejected contract immediately before the bankruptcy filing. Rejection merely indicates that the estate will not perform the debtor's future duties under the contract and gives the counterparty a breach-of-contract claim in the bankruptcy case. It does not give the estate any greater rights than the breaching party to a contract would have outside bankruptcy.

Nor does rejection of a contract allow the estate to take back interests in the debtor's assets—such as a leasehold interest in real estate or a license to intellectual property—that the debtor transferred to the counterparty under the contract before bankruptcy. Because the estate enjoys no greater rights in the debtor's assets than the debtor would have outside bankruptcy, the debtor's assets come into the estate subject to any interest already granted to the counterparty. The trustee can undo a debtor's pre-bankruptcy grant of an interest in its property only through the Bankruptcy Code's avoidance provisions, which impose strict substantive and procedural limitations. Rejection is not an implied avoiding power, unbounded by those limitations.

II. Rejection of the Agreement here did not revoke either Mission's non-exclusive trademark rights or its exclusivity rights. Rejection was simply a breach of Tempnology's future affirmative performance obliga-

tions under the Agreement. Because Tempnology's breach could not have terminated Mission's trademark and exclusivity rights outside bankruptcy, rejection could not do so inside bankruptcy. Moreover, the Agreement transferred those interests in Tempnology's intellectual property to Mission before bankruptcy. Outside bankruptcy, Tempnology could not use or sell its intellectual property free of Mission's rights. The property thus came into the estate subject to those same limitations. Rejection of the license agreement was not avoidance and could not expand the estate's rights in the intellectual property.

III. Section 365(n) creates no negative inference that rejection terminates trademark licensees' rights. Nor does the purported burden of monitoring a licensee's use of a trademark justify revoking the licensee's rights. Trademark law provides that the owner of a mark must monitor licensees to ensure continued ownership of the mark. But rejection frees the estate only from the burden of performing *under contracts*; it does not exempt the estate from duties imposed by generally applicable law. Whether the estate should incur the cost of monitoring to preserve the value of a trademark is an economic decision that is no different than any of the trustee's many other decisions whether to incur costs to preserve estate assets. Finally, the general Chapter 11 policy promoting reorganization does not support reading into §365 a power to terminate third-party rights in estate assets. To be sure, such a power would help maximize the value of the estate. But that proves too much: It would support reading the Bankruptcy Code to terminate *all* rights of non-debtors in the debtor's assets, contrary to basic bankruptcy principles.

ARGUMENT

I. Rejection Of An Executory Contract Does Not Rescind The Contract Or Revoke Interests In Property The Debtor Granted The Counterparty Pre-Bankruptcy

A. Rejection Under Section 365 "Constitutes A Breach" And Has The Same Consequences As Breach Outside Bankruptcy

1. The Bankruptcy Code provides a federal process for marshalling a debtor's property, maximizing its value, and distributing that value among the debtor's creditors. In Chapter 7, that process is overseen by a trustee. §§702, 704. In Chapter 11, the debtor typically remains in possession of its property and, as the "debtor in possession," takes on the administrative and fiduciary duties of a trustee. §§1101(1), 1107; *see Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 978 (2017).[6]

In either Chapter 7 or Chapter 11, the first step in the bankruptcy process is the creation of the estate—a separate legal entity from the debtor that comes into existence when the debtor files for bankruptcy. The estate includes "all legal or equitable interests of the debtor in property as of the commencement of the case." §541(a)(1). It is the *res* out of which creditors' claims are paid.

One significant part of the trustee's role in maximizing the value of the estate is determining whether the estate should assume ongoing contracts that the debtor entered before bankruptcy. Section 365 provides that, subject to bankruptcy court approval, the trustee "may

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[6] For simplicity and clarity, we use "trustee" to mean "trustee or debtor-in-possession."

assume or reject any executory contract or unexpired lease of the debtor." §365(a). An executory contract is a contract "'on which performance is due to some extent on both sides.'" *NLRB* v. *Bildisco & Bildisco*, 465 U.S. 513, 522 n.6 (1984). Executory contracts thus represent both an asset—the debtor's right to obtain the counterparty's future performance—and a liability—the debtor's obligation to perform in the future, or to pay damages if it breaches that obligation. Baird, *Elements of Bankruptcy* 112 (6th ed. 2014) ("Baird").

Section 365 enables the trustee to weigh the cost and benefit associated with an executory contract and determine whether the value of the contractual asset exceeds the associated liability. If so, the trustee may assume the contract, meaning that the estate will fulfill the debtor's future performance obligations under the contract; otherwise, the contract may be rejected, meaning that the estate will not fulfill the debtor's future performance obligations and the counterparty will have a claim against the debtor for breach. *See In re Columbia Gas Sys. Inc.*, 50 F.3d 233, 238-239 & n.8 (3d Cir. 1995); Baird 112-115; Westbrook, *A Functional Analysis of Executory Contracts*, 74 Minn. L. Rev. 227, 247-255 (1989) ("Westbrook"); Andrew, *Executory Contracts in Bankruptcy: Understanding 'Rejection,'* 59 U. Colo. L. Rev. 845, 855 (1988) ("Andrew").

To take a stylized example, say that before bankruptcy the debtor, *D*, a widget merchant, entered into an agreement with a counterparty, *C*, in which *D* agreed to ship *C* 1,000 widgets a month for 10 months, and *C* agreed to pay *D* $1 per widget on delivery. Before shipping any widgets, *D* files for bankruptcy. Widgets are a volatile commodity, and between the time the parties enter the contract and the bankruptcy filing, the market price of a widget falls to 50 cents.

The value of *C*'s performance—$10,000—now exceeds the cost of *D*'s performance, since *D* can buy the widgets for $5,000 and make a $5,000 profit. Under these circumstances, a rational trustee would assume the contract.

Once assumed, the contract remains in full force, and the estate steps into the shoes of the debtor. The estate can now obtain *C*'s $10,000 payment, but it is also obligated to ship the widgets. If it fails to do so, and *C* incurs any damages as a result of the breach, *C*'s damages claim runs against the estate. The claim is treated as a cost of administering the estate and is entitled to administrative-expense status, meaning that it has priority over other unsecured claims and must be paid in full for a Chapter 11 plan to be confirmed. §§365(b), 503(b), 507(a)(2), 726(a), 1129(a)(9); *Bildisco*, 465 U.S. at 531-532; Andrew 881-882, 890.

On the other hand, say that the market price of a widget rises between the time the parties enter the contract and the bankruptcy filing. If the price rises from $1 to $2, the value of *C*'s performance—still $10,000—is now less than the cost of *D*'s performance, which is $20,000. Under these circumstances, a rational trustee would reject the contract, since assuming it would create a net loss to the estate of $10,000.

Rejecting the contract does not make it go away. Like assumption, it does not change the contract at all. It simply means that the estate is not assuming the debtor's future performance obligations to the counterparty, which remain the debtor's and thus will not be performed. Rejection is in many ways analogous to anticipatory repudiation of a contract—which is a breach of that contract—outside bankruptcy. *See, e.g., Central States, Se. & Sw. Areas Pension Fund* v. *Basic Am.*

Indus., Inc., 252 F.3d 911, 916 (7th Cir. 2001); 23 Lord, *Williston on Contracts* §63:50 (4th ed. 1990) (*"Williston"*); *see also Restatement (Second) of Contracts* §253 cmt. a (1981) (anticipatory repudiation is a breach of contract).

The Code therefore provides that rejection of a contract "constitutes a breach of such contract ... immediately before the date of the filing of the petition." §365(g)(1); *see* §502(g)(1). *C* has a breach-of-contract claim against *D* arising out of *D*'s failure to ship the widgets, just as *C* would outside bankruptcy. However, because *C*'s claim is treated as a pre-petition claim, *C* will be paid only the *pro rata* share of its claim that other general unsecured creditors receive—typically, cents on the dollar. What rejection under §365 does, at bottom, is ensure that a debtor's pre-bankruptcy promise to perform on a contract that the trustee does not assume is treated the same way as a debtor's pre-bankruptcy promise to pay a debt—that is, it gives rise to a claim in the bankruptcy case. Andrew 882-884.

2. But that is all rejection does: It "constitutes a breach" of the rejected contract. §365(g)(1). "Breach" here means exactly what it does under the common law: a violation of a contractual obligation that "gives rise to a claim for damages, and may give rise to other remedies." *Restatement (Second) of Contracts* §236 cmt. a; *see Field* v. *Mans*, 516 U.S. 59, 69 (1995) (where the Bankruptcy Code "uses terms that have accumulated settled meaning under the common law, a court must infer, unless the statute otherwise dictates, that Congress meant to incorporate the established meaning of those terms" (internal quotation marks and ellipsis omitted)).

The statutory text accordingly makes clear that, except where §365 specifically provides otherwise, rejection of a contract has whatever consequences breach of that contract would have under non-bankruptcy law. It does not give the estate anything more, or the counterparty anything less, than the parties would have outside bankruptcy. That is consistent with the "'basic federal rule' in bankruptcy ... that state law governs the substance of claims." *Raleigh* v. *Illinois Dep't of Revenue*, 530 U.S. 15, 20 (2000) (quoting *Butner* v. *United States*, 440 U.S. 48, 57 (1979)); *accord Travelers Cas. & Sur. Co. of Am.* v. *Pacific Gas & Elec. Co.*, 549 U.S. 443, 450-451 (2007); *Vanston Bondholders Protective Comm.* v. *Green*, 329 U.S. 156, 161 (1946); *see also, e.g.*, *BFP* v. *Resolution Trust Corp.*, 511 U.S. 531, 544-545 (1994) (absent a "'clear and manifest'" purpose to the contrary, "the Bankruptcy Code will be construed to adopt, rather than to displace, pre-existing state law").

The consequential aspect of rejection from a bankruptcy perspective is simply that the debtor's breach is deemed to occur not on the date of rejection, but "immediately before the date of the filing of the petition." §365(g)(1). Because rejection means that the estate will not assume the debtor's obligations, any claim for damages by the counterparty is treated as a prepetition claim against the debtor—paid *pro rata* along with other general unsecured claims against the debtor—rather than an administrative claim against the estate, which has higher priority. *Id.*; §502(g)(1); Andrew 889 ("Rejection establishes that the *estate* will not become obligated on the contract; it does not affect the continued existence of the *debtor's* obligations, which form the basis of the [counterparty's] claim."). Other than the timing of the breach, nothing about rejection

under the Bankruptcy Code differs from breach outside bankruptcy.

That is the conclusion the Seventh Circuit reached in *Sunbeam*, which held—in contradiction to the First Circuit here—that a debtor-licensor's rejection of a trademark license could not deprive the licensee of its right to use the trademark. *Sunbeam Prods., Inc.* v. *Chicago Am. Mfg., LLC*, 686 F.3d 372, 377 (7th Cir. 2012). As the Seventh Circuit explained: "What §365(g) does by classifying rejection as breach is establish that in bankruptcy, as outside of it, the other party's rights remain in place." *Id.* While rejection means that "[t]he debtor's unfulfilled obligations are converted to damages," "nothing about this process implies that any rights of the contracting party have been vaporized." *Id.* Accordingly, since "[o]utside of bankruptcy, a licensor's breach does not terminate a licensee's right to use intellectual property," rejection of a license agreement in bankruptcy cannot do so either. *Id.* at 376.

Other courts and scholars agree that rejection of an executory contract in bankruptcy has essentially "the same consequences as breach of the same contract outside of bankruptcy." Baird 114; *see Columbia Gas*, 50 F.3d at 239 n.8 ("Rejection ... is equivalent to a non-bankruptcy breach."); *In re Lavigne*, 114 F.3d 379, 387 (2d Cir. 1997); *In re Austin Dev. Co.*, 19 F.3d 1077, 1082 (5th Cir. 1994) ("[C]ontract or lease liabilities remain intact after rejection and give the non-debtor party a claim in the distribution of the estate."). Rejection thus does not terminate rights that would survive the debtor's breach under applicable non-bankruptcy law. Baird 115.

Put differently, rejection is not a special bankruptcy "power" that can change the non-bankruptcy rights of the parties to a contract. "Rejection is not the power to release, revoke, repudiate, void, avoid, cancel or terminate, or even to breach, contract obligations." *Lavigne*, 114 F.3d at 387. It "merely frees the estate from the obligation to perform" and "'has absolutely no effect upon the contract's continued existence; the contract is not cancelled, repudiated, rescinded, or in any other fashion terminated.'" *Thompkins* v. *Lil' Joe Records, Inc.*, 476 F.3d 1294, 1306 (11th Cir. 2007). Rejection is not "the functional equivalent of a rescission, rendering void the contract and requiring that the parties be put back in the positions they occupied before the contract was formed." *Id.*; *see also Sunbeam*, 686 F.3d at 377; *In re Exide Techs.*, 607 F.3d 957, 967 (3d Cir. 2010) (Ambro, J., concurring) (explaining, in context of rejection of trademark license, that "'rejection is a breach of the executory contract'" and "'not avoidance, rescission, or termination'"); Andrew 848 ("[R]ejection is not the revocation ... or cancellation of a contract" and "does not change the substantive rights of the parties to the contract[.]"). Rejection thus cannot terminate the counterparty's rights under a contract or strip it "of any benefits of the contract" if the counterparty "would have been entitled to these benefits had the breach occurred outside of bankruptcy." Baird 115.

B. Rejection Is Not An Avoidance Power And Cannot Give The Bankruptcy Estate Any Greater Rights To An Asset Than The Debtor Had Outside Bankruptcy

For the same reasons, rejection cannot give the estate any greater right to an asset than the debtor pos-

sessed outside bankruptcy. Certain contracts, such as leases and licenses—even if they are unexpired or "executory" on the petition date due to some continuing obligations of the parties—convey an interest in an underlying asset, such as real property or intellectual property, to the counterparty before bankruptcy. Because the estate cannot enjoy greater property rights than the debtor had outside bankruptcy, such assets enter the bankruptcy estate subject to the counterparty's interest. Although such a pre-bankruptcy transfer of an interest in property can be undone in specific circumstances under the Bankruptcy Code's avoidance provisions, rejection of the contract that transferred that interest is not avoidance and cannot expand the estate's rights in the underlying asset.

1. The bankruptcy estate created upon the filing of a petition comprises all "legal and equitable interests *of the debtor* in property," §541(a)(1) (emphasis added). The estate does not include any interests in property held by another party. If the debtor's rights in an asset would be limited in the debtor's hands outside bankruptcy by interests granted to third parties, the estate's rights in the asset are equally limited in bankruptcy.

One very common example is a lien. If a nondebtor has a lien on the debtor's property outside bankruptcy, the property comes into the estate subject to the lien. That property thus cannot be distributed to unsecured creditors until the lien is fully satisfied. §§506(a), 725, 1129(b)(2)(A); *Associates Commercial Corp.* v. *Rash*, 520 U.S. 953, 961 (1997). And the lienholder is entitled to "adequate protection" of its lien to ensure that its interest in the debtor's property is not diminished through the bankruptcy process. §§361, 362(d), 363(e), 364(d).

As this Court established long ago, however, the principle is not limited to liens. Rather, the estate's rights in the debtor's property are limited by any interests other parties have in the property that are valid outside bankruptcy, regardless of the form those interests may take. *Board of Trade of City of Chicago* v. *Johnson*, 264 U.S. 1, 7-15 (1924) (holding that the debtor's seat on the Chicago Board of Trade came into the debtor's estate subject to other Board members' right to have their debts paid in full before the seat was sold). And because the estate does not acquire a non-debtor's interest in the debtor's property, that interest is not part of the value that can be distributed to other creditors in bankruptcy.

Chicago Board of Trade set out the relationship between bankruptcy and non-bankruptcy law in determining what constitutes property of the estate. This Court held that the question whether a particular interest is an interest in property that comes into the estate is one of federal bankruptcy law. *Chicago Board of Trade*, 264 U.S. at 10. Although the Illinois Supreme Court had held that the debtor's seat on the Board was *not* "property" under Illinois law, *id.* at 8-9, that decision could not control what constitutes "property" under bankruptcy law. Since the debtor could transfer the seat under certain circumstances, it was "property" for purposes of the Bankruptcy Act. *Id.* at 10-11, 13; *see also, e.g.*, *In re The Ground Round, Inc.*, 482 F.3d 15, 17 (1st Cir. 2007) (liquor license was property for bankruptcy purposes even if not treated as property by state statute).

This Court also held, however, that the seat came into the estate subject to the restrictions on transfer that existed under the Board's rules. Because, outside bankruptcy, the debtor could not have sold the seat

without first paying his debts to other Board members in full, the trustee in bankruptcy could not do so either. *Chicago Board of Trade*, 264 U.S. at 15. The interest of the other Board members in the seat was analogous to a lien, and their claims thus had to "be satisfied before the trustee [could] realize anything on the transfer of the seat for the general estate." *Id.*; *see also, e.g.*, *Ground Round*, 482 F.3d at 18 ("'A bankruptcy estate cannot succeed to a greater interest in property than the debtor held prior to bankruptcy.'").

"*Chicago Board of Trade* remains good law," not only for its holding regarding seats on exchanges, but also "for the broad principle it embraces." Baird 96. Simply put, any "limitation on the debtor's property ... that applies outside of bankruptcy ... applies inside of bankruptcy as well. A debtor's property does not shrink by happenstance of bankruptcy, but it does not expand, either." *Id.* at 97.

2. The trustee can expand the estate's interest in property beyond what the debtor had on the petition date in only one way: by bringing and prevailing in an action under the avoidance provisions of the Code. Those provisions apply only in specific, narrow circumstances.

For instance, if the debtor conveyed rights in its assets to a third party for less than reasonably equivalent value while insolvent—thus depleting the assets available to repay creditors—the transaction could potentially be unwound as a "fraudulent transfer." §§548(a)(1)(B)(i), 544(b)(1). Similarly, if the debtor conveyed rights in its assets to a particular creditor on the eve of bankruptcy—giving that creditor preferential treatment over other creditors who must share *pro rata* in bankruptcy—the transaction could potentially be

unwound as a "preference." §547(b). The trustee may also avoid unperfected security interests in the debtor's property. §544(a)(1). When the trustee succeeds in avoiding such transfers, the trustee may recover the property transferred, or its value, for the estate and distribute it to creditors. §550(a); *see* §541(a)(3).

These "avoiding" powers are limited exceptions to the basic principle that the bankruptcy estate enjoys no greater rights in the debtor's assets than the debtor would have outside bankruptcy. They permit a trustee to reclaim interests in property the debtor granted to another party before bankruptcy in specific circumstances where the transaction undermined the bankruptcy process, such as by conveying rights in an insolvent debtor's assets too cheaply (contravening the policy of maximizing value) or by preferring one creditor over others (contravening the policy of equal distribution). Except in these limited circumstances, the Bankruptcy Code enforces the bargains the debtor made outside bankruptcy.

3. Rejection is not an avoidance power and cannot enhance the estate's rights in property. As a textual matter, §365 contains no hint that rejection of a contract entitles the debtor to "avoid" or terminate any rights conveyed to the counterparty before bankruptcy. As discussed, *see supra* Part I.A, rejection is merely a breach of the debtor's future performance obligations under the contract. §365(g). By its terms, "'[§]365 addresses only future performance obligations of the parties'"; it does not "reverse[] any transfer of asset ownership" or other interests in property "previously carried out by the rejected contract." *Thompkins*, 476 F.3d at 1306-1307; *see also Austin*, 19 F.3d at 1083 (rejection is not an "implied avoidance power").

Indeed, it would violate basic principles of statutory construction to read into §365 an implied "avoiding" power, unbounded by the limitations Congress expressly set out in the Code's avoidance provisions, that is strikingly discordant with the Bankruptcy Code's usual respect for other parties' rights in the debtor's assets. *See, e.g.*, *Czyzewski*, 137 S. Ct. at 984 (this Court would "expect more than simple statutory silence if, and when, Congress were to intend a major departure" from an important bankruptcy principle). Accordingly, there is widespread agreement that "[§]365 is not an avoiding power designed to expand the assets of the estate and give creditors inside of bankruptcy something they would not have had outside." Baird 115.

The point is illustrated by the treatment in bankruptcy of real property leases—contracts that, like intellectual property licenses, grant the counterparty an interest in the debtor's property. In the context of real property leases, "the law has long been clear that rejection properly has no avoiding-power effect." Andrew 902.

As Andrew explains, "in a lessor's bankruptcy there are *two* distinct assets at issue. One is the lessor's rights in the lease." Andrew 904. But "the lessor's estate also includes the lessor's interest in the *underlying* asset, the property which is the subject of the lease." *Id.* And, under the principle of *Chicago Board of Trade*, that underlying asset comes into the estate subject to the tenant's leasehold interest. *Id.* at 904-905. "[T]here is nothing about rejection of the *lease* asset in the lessor's bankruptcy that terminates the lessee's right to possession of the *underlying* asset." *Id.* at 905. If the lessor sold the underlying property to a third party outside of bankruptcy, the buyer would "not [be] obligated to perform the lessor's personal cove-

nants," but it could not "oust the lessee." *Id.* Following rejection of the lease, the estate is in precisely the same position. *Id.*

As the Seventh Circuit put it in *Sunbeam*:

> [A] lessor that enters bankruptcy could not, by rejecting the lease, end the tenant's right to possession and thus re-acquire premises that might be rented out for a higher price. The bankrupt lessor might substitute damages for an obligation to make repairs, but not rescind the lease altogether.

686 F.3d at 377; *see* Baird 117 (in a lessor's bankruptcy, "[t]he trustee can reject the lease and cease heating and cooling the building," but rejection "does nothing to dispossess [the lessee] from the property"; the lessee's leasehold interest gives it "a right to the asset that primes that of any of [the debtor's] creditors").[7]

The same principle applies whenever the debtor has conveyed an interest in an asset under an executory contract before bankruptcy. Rejection is a breach of the debtor's future performance obligations; it does not permit the trustee to avoid and recover for the estate property interests the debtor previously granted under the contract. *See, e.g.*, *Ground Round*, 482 F.3d at 17-21 (trustee's rejection of real property lease did not terminate landlord's reversionary interest in liquor license, which debtor granted under the lease before

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[7] The Bankruptcy Code codifies this result for leases. §365(h)(1). We explain below, *see infra* Part III.A, why §365(h) and similar provisions like §365(n) are best read as expressions of the general principle that rejection does not expand the estate's rights in property, rather than exceptions to a rule that rejection *does* expand such rights.

bankruptcy); *Leasing Serv. Corp.* v. *First Tenn. Bank Nat'l Ass'n*, 826 F.2d 434, 436-437 (6th Cir. 1987) (trustee's rejection of equipment lease did not strip counterparty of security interest in debtor's assets, which debtor granted under the lease before bankruptcy).

As discussed further below, *see infra* Part II, intellectual property licenses work the same way; they are contracts that convey an interest in the debtor's property to the counterparty before bankruptcy. Andrew 916. A license gives the licensee an interest in the licensor's intellectual property. Typically, that interest is not ownership of the entire bundle of rights to the property, but particular sticks in the bundle: the right to use the property and/or to exclude others from using it. When the licensor files for bankruptcy, its intellectual property comes into the estate. But it does so subject to the license. §541(a); *Chicago Board of Trade*, 264 U.S. at 8-12, 15. The debtor cannot use the rejection power to recapture the sticks that it removed from its bundle of rights before bankruptcy and that, accordingly, never came into the estate. In short, §365 does not "let a licensor take back trademark [or other intellectual property] rights it bargained away" from the licensee so that it can profit by selling or licensing those rights to someone else. *Exide*, 607 F.3d at 967 (Ambro, J., concurring).

C. The First Circuit's Decision, And The Fourth Circuit Decision It Followed, Contravene These Basic Principles

The First Circuit's decision below, along with the Fourth Circuit decision on which it relied, *Lubrizol Enterprises* v. *Richmond Metal Finishers, Inc.*, 756 F.2d 1043 (4th Cir. 1985), cannot be reconciled with the fundamental principles set out above. Those decisions ig-

nore or misread the text of the Bankruptcy Code, misapprehend the function of rejection in bankruptcy, and improperly treat rejection as an avoidance power.

1. *Lubrizol* addressed the effect of rejection of an intellectual property license agreement under which, before bankruptcy, the debtor had granted a licensee the right to use the debtor's patented metal-coating process technology. 756 F.2d at 1045. The debtor sought to reject the license agreement because "stripping [the licensee] of its rights in the process" would enable it to "sell or license the technology on more advantageous terms to other potential licensees." *Id.* at 1047. The Fourth Circuit devoted most of its analysis to the question whether the license agreement was executory, concluding that it was because the licensee had an ongoing duty to deliver quarterly sales reports and keep account books subject to inspection. *Id.* at 1045-1046.

The court then held—in a single cursory paragraph—that rejection of the license agreement not only relieved the debtor from performing its future obligations under the contract, but also enabled it to "deprive [the licensee] of all rights to the [metal-coating] process" and make a new, more profitable deal for those rights. *Lubrizol*, 756 F.2d at 1048. The court opined that "the legislative history of §365(g) makes clear that the purpose of the provision is to provide only a damages remedy for the non-bankrupt party" and that the licensee thus "could not seek to retain its contract rights in the technology by specific performance." *Id.*[8]

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[8] The legislative history on which *Lubrizol* relied in fact says no such thing; it merely addresses the "*time* as of which a rejection ... constitutes a breach," noting that claims resulting from rejection will be "treat[ed] ... as prepetition claims." H.R. Rep. No. 95-

Even though, outside bankruptcy, the licensee would have been entitled to continue to use the technology after the debtor's breach, the Fourth Circuit concluded that §365 overrode those rights and gave the licensee only a pre-petition damages claim. *Id.*[9]

For its part, the First Circuit conceded that rejection of a license agreement "does not 'vaporize'" the licensee's rights, but reasoned, like the Fourth Circuit in *Lubrizol*, that rejection "converts the [licensee's] right[s] into a pre-petition claim for damages," thus enabling Tempnology to take back and relicense the rights it had granted to Mission under the Agreement. Pet. App. 22a.

2. As many courts and scholars have recognized, *Lubrizol*—and now the First Circuit's decision—is in error because it effectively treats rejection as an avoidance power. On the First and Fourth Circuit's reasoning, rejection enables the estate to obtain greater rights in the debtor's property than the debtor itself had prior to bankruptcy, clawing back rights already granted to licensees and reselling those rights to others. That result misunderstands the function of rejection, which, as discussed above, *see supra* Part I.A, is simply to ensure that the estate is not required to assume affirmative performance obligations of the debtor that will cause a net loss to the estate. It also violates the principle of *Chicago Board of Trade*, failing to recognize that intellectual property licenses—like leases—grant an interest in property to the licensee that cannot

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595, at 349 (1977) (emphasis added), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6305.

[9] As discussed below, *see infra* Part III.A, Congress quickly repudiated *Lubrizol* by enacting §365(n), which applies to certain intellectual property licenses (though not trademark licenses).

be brought back into the estate except through an avoidance action.

In other words, *Lubrizol* and the decision below improperly terminate "the rights of third parties in or to property in which the debtor had an interest" "without any of the justifications of the avoiding powers," merely "because the third party's rights arise under a contract that happens to be 'executory' when the bankruptcy commences." Andrew 902; *see id.* at 916 (describing *Lubrizol* as "[t]he case that illustrates perhaps better than any other what is wrong with avoiding-power rejection"); *Sunbeam*, 686 F.3d at 377 ("*Lubrizol* ... confuses rejection with the use of an avoiding power."); Baird 122-123 & n.9.

As another scholar explained, *Lubrizol*'s treatment of rejection as avoidance is "so dangerous because it provides no requirement of insolvency, limitation of time, or any other limit" imposed by the Code's actual avoidance provisions, which are carefully drawn to undo pre-bankruptcy transfers of property interests only where the basic purposes of bankruptcy would otherwise be thwarted. Westbrook 307. It is also arbitrary. There is no bankruptcy justification for a rule under which a licensee can lose its rights based solely on the fortuity that some trivial obligation—like that in *Lubrizol*—renders the license agreement executory. Indeed, such a rule "is fundamentally contrary to general bankruptcy principles, to the history and purpose of executory contracts doctrine itself, and to common sense." Andrew 849.

3. *Lubrizol* and the decision below both seemingly relied in significant part on the notion that the remedy of "specific performance" is unavailable in bankruptcy, and that allowing licensees to retain their rights after

rejection would be a form of specific performance. 756 F.2d at 1048; *see* Pet. App. 22a-23a. But no categorical bar on "specific performance" in bankruptcy justifies turning rejection into an avoidance power.

a. First, the "specific performance" argument entirely fails to address the point that rejection of a contract cannot revoke interests in property already granted under that contract before bankruptcy. Rejection is merely the decision that the estate will not assume the contract asset (or the associated performance obligations). It cannot have any effect on the underlying intellectual property and certainly cannot expand the estate's interest in that property. Rejection thus cannot "convert[] [a] right" in intellectual property already conveyed to the licensee before bankruptcy "into a pre-petition claim for damages" (Pet. App. 22a), as the First Circuit believed.

Recharacterizing a licensee's rights as a negative covenant by the licensor, such as a covenant not to sue the licensee for infringement, or a covenant not to license the intellectual property to others, does not change matters. Even though the estate is not assuming the debtor's future performance obligations under the license agreement, the estate nonetheless takes the debtor's intellectual property subject to the license the debtor conveyed to the licensee before bankruptcy—just as, outside bankruptcy, an assignee that does not assume the debtor's contractual obligations would nonetheless take such property subject to the licensee's rights. Andrew 922-926; *see infra* Part II.A.1, II.B.1.

b. In any event, it is not accurate to say that specific performance is never permitted in bankruptcy. The Bankruptcy Code contains no provision categorically denying specific performance or other equitable

relief in bankruptcy. "Indeed, bankruptcy law recognizes third parties' equitable interests in property, including interests the essence of which is the right to obtain the specific property." Andrew 908. To the extent that the Code contains implicit limitations on creditors' ability to invoke specific performance, those limitations stem from the basic bankruptcy principle that similarly situated creditors must be treated similarly. *Id.* at 926 ("The principle behind the 'no-specific-performance' argument is that allowing specific performance would prefer one claimant over others similarly situated.").

Pre-petition creditors with breach-of-contract claims against the debtor (including claims created by rejection of a contract) typically cannot require the estate to perform the debtor's *affirmative* obligations under a contract. *See, e.g., Sunbeam*, 686 F.3d at 377 ("After rejecting a contract, a debtor is not subject to an order of specific performance."). That makes sense: A claim for damages due to a pre-petition breach of contract is usually a general unsecured claim that will be paid at cents on the dollar. If a pre-petition creditor could compel the estate to perform the debtor's affirmative obligations, however, that specific performance would be the equivalent of payment in full.

Again taking the example of the contract under which the widget-merchant debtor agrees to sell widgets to counterparty *C*, *see supra* pp. 17-19, if the market price of the widgets rises from $10,000 to $20,000 and the trustee rejects the contract, *C* should not be able to compel the estate to deliver the widgets. In that event, *C* would get $10,000 in value from the estate, rather than the $3,000 it would get on its damages claim if general unsecured creditors are paid at 30%. That would violate the principle of equality among similarly

situated creditors. It would also frustrate the purpose of rejection, which is to ensure that the estate is not required to take on the debtor's liabilities and pay them as administrative expenses (with priority over other unsecured claims) unless doing so creates value for the estate. Andrew 925.

But respecting the rights of a licensee under an intellectual property license—even if one calls it "specific performance"—neither offends the principle of equality nor thwarts the purpose of rejection. Requiring the estate to abide by *negative* covenants that a debtor-licensor made in a license agreement—pledging not to interfere with its licensee's rights—does not require the estate to give the licensee anything. It thus does not enable a licensee to receive more than other similarly situated creditors on any breach-of-contract claim it might have. For the same reason, respecting licensees' rights does not obviate rejection's purpose of freeing the estate from liabilities arising out of unprofitable pre-petition contracts. Simply put, requiring the estate to refrain from violating a licensee's rights does not create any liability for the estate. Accordingly, no principle of bankruptcy law or policy prohibits such a requirement.

II. Rejection Of The License Agreement Did Not Revoke Mission's Rights Under The Agreement

Under the basic principles set out above, the rejection of the parties' license agreement did not revoke, and could not have revoked, either Mission's non-exclusive trademark rights or its exclusivity rights.

A. Rejection Did Not Revoke Mission's Non-Exclusive Trademark Rights

Rejection of the Agreement did not revoke Mission's non-exclusive trademark license. That license was an interest in Tempnology's trademarks granted to Mission before bankruptcy, and the marks therefore came into Tempnology's estate subject to the license. Moreover, outside bankruptcy, Tempnology's breach of the Agreement could not have terminated Mission's right to continue to use the marks. Mission accordingly retained its right to use the licensed trademarks after rejection of the Agreement, contrary to the First Circuit's holding.

1. Like leases, licenses of intellectual property, including trademarks, implicate two distinct assets: the license agreement and the underlying intellectual property. And, as with leases, "[b]ecause the estate succeeds only to the debtor's [rights]" in the intellectual property, rejection of the agreement cannot "terminate the non-debtor party's right to the licensed ... use" of that intellectual property. Andrew 916. "Whether the debtor is a licensor, lessor, vendor, or mortgagor, or any other owner of real or personal property in or to which a third party has rights under a contract, the analysis should be the same.... [R]ejection of the *contract* does not enhance the estate's rights to the *underlying asset*." *Id.* at 920-921.

Trademarks are no exception to that rule, which is merely an application of the basic principle announced in *Chicago Board of Trade*. Trademarks are "property" within the meaning of the Bankruptcy Code. *See, e.g.*, *College Sav. Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 673 (1999) (trademarks constitute "'property'" of their owner); *K Mart*

Corp. v. *Cartier, Inc.*, 485 U.S. 176, 185-186 (1988) (trademarks afford their owners a "bundle ... of rights," including the power to exclude others from using them, to sell them, and to license them); 1 *McCarthy on Trademarks and Unfair Competition* §2:10 (5th ed. 2017) ("*McCarthy*") (same).

A license to use a trademark—including a non-exclusive license—is likewise an "interest in property" within the meaning of the Code. Under *Chicago Board of Trade*, it makes no difference whether trademark or other non-bankruptcy law would characterize a non-exclusive license as a property interest. 264 U.S. at 8-12; *see Ground Round*, 482 F.3d at 17 (reversionary interest in liquor license was interest in property notwithstanding contrary state law). "The label ... that state law affixes to a particular interest ... is not always dispositive. The principal question is whether the substance of the right or interest ... brings it within the scope of estate property under the Bankruptcy [Code]." *In re Nejberger*, 934 F.2d 1300, 1302 (3d Cir. 1991) (right to renew liquor license was interest in property). Or, as this Court put it in a case interpreting the federal tax-lien statute, "A common idiom describes property as a 'bundle of sticks.' ... State law determines only which sticks are in a person's bundle. Whether those sticks qualify as 'property' for purposes of [a] federal ... statute is a question of federal law." *United States* v. *Craft*, 535 U.S. 274, 278-279 (2002).

Like other property rights, ownership of a trademark can be described as a bundle of sticks. *See, e.g., K Mart*, 485 U.S. at 185-186. When the owner of the mark grants a license, it conveys certain "sticks" in the bundle to the licensee. 1 *McCarthy* §2:10 (a trademark is a "bundle of rights in intellectual property" that can be "bought and sold" and "'licensed'"). In this case, the

non-exclusive license gave Mission the right to use Tempnology's marks; put differently, Tempnology gave up its right to exclude Mission from using its marks for the term of the Agreement (absent a material breach by Mission). It follows that, under *Chicago Board of Trade*, the trademarks came into the bankruptcy estate subject to that same limitation.

That is particularly clear given that, outside bankruptcy, Tempnology could not have conveyed its trademarks to an assignee free of Mission's right to use them. "An assignee [of a trademark] ... acquires not only all the favorable rights and priorities of the assignor, but also any burdens and limitations on use that were incumbent on the assignor." 3 *McCarthy* §18:15. That is, a trademark owner cannot, "merely by a sale," "confer greater rights" in its mark "than it had." *Donnell* v. *Herring-Hall-Marvin Safe Co.*, 208 U.S. 267, 273 (1908); *see also, e.g.*, *A&L Labs, Inc.* v. *Bou-Matic LLC*, 429 F.3d 775, 779 (8th Cir. 2005) (sale of licensor's assets to third party "could not extinguish" trademark license agreement made before sale). The estate's position after rejection of a license agreement is no better than "that of any other ordinary transferee acquiring the underlying asset from the debtor without assuming the debtor's contract obligations." Andrew 921. Rejection of the license agreement thus could not expand the estate's rights in the trademarks by eliminating Mission's rights under its license.

2. In addition to flouting the *Chicago Board of Trade* principle, using rejection to strip Mission of its non-exclusive trademark rights violates the statutory command that rejection constitutes a breach by the debtor. Outside bankruptcy, Tempnology could not have taken away Mission's right to use the trademarks by

breaching the license agreement. It therefore cannot do so by rejecting the license agreement in bankruptcy.

As the Seventh Circuit explained in *Sunbeam*: "Outside of bankruptcy, a licensor's breach does not terminate a licensee's right to use intellectual property." 686 F.3d at 376. As part of the agreement in *Sunbeam*, the debtor-licensor had agreed to supply the licensee with motors for the trademarked box fans the licensee was distributing. The court posited: "Suppose that, before the bankruptcy began, [the licensor] had broken its promise by failing to provide the motors." *Id.* In that event, the licensee could have opted either to treat the contract as terminated or to buy motors elsewhere and seek damages from the licensor. *Id.* at 376-377. The licensor "could not have ended [the licensee's] right to sell the box fans by failing to perform its own duties, any more than a borrower could end the lender's right to collect just by declaring that the debt will not be paid." *Id.* at 377.

Precisely the same is true here. Outside bankruptcy, Tempnology's breach of its obligations under the Agreement—such as its obligation to fill Mission's purchase orders—could never give it the right to stop Mission from using the licensed trademarks. (Indeed, that is precisely why Tempnology pursued rejection in bankruptcy—to obtain the power it lacked outside bankruptcy to revoke Mission's rights under the Agreement. *See supra* p. 9.) The Agreement gave Mission the legal entitlement to use the trademarks; had Tempnology tried to stop Mission from doing so, the Agreement would have been a full defense to that claim. "By definition, a party who holds a valid license to use a trademark and is not in breach of the license cannot be an infringer of the licensed mark." 3 *McCarthy* §18:40.

Fundamental principles of contract law—and common sense—require that result. A licensor's breach may give the *licensee* the right to terminate a license agreement, but not the breaching licensor. When one party to a contract commits a material breach, the non-breaching party may "either stop [its own] performance and assume the contract is avoided, or continue its performance and sue for damages." *S&R Corp.* v. *Jiffy Lube Int'l Inc.*, 968 F.2d 371, 376 (3d Cir. 1992); *see ARP Films, Inc.* v. *Marvel Entm't Grp., Inc.*, 952 F.2d 643, 649 (2d Cir. 1991); 13 *Williston* §39:32; *Restatement (First) of Contracts* §309 cmt. a (1932).[10] But "contract doctrine would not permit the breacher [of a license agreement] *to benefit from its own breach* by revoking the license." Westbrook 308 (criticizing *Lubrizol*); *see also* Baird 120 (under non-bankruptcy law, a licensor that breaches a license agreement cannot stop the licensee from continuing to use the licensed intellectual property). "No bankruptcy rule or policy" justifies a departure from that basic non-bankruptcy law principle. Westbrook 308.

B. Rejection Did Not Revoke Mission's Exclusivity Rights

Essentially the same analysis governs Mission's exclusivity rights. Tempnology granted Mission the ex-

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[10] Of course, if the licensee "elect[s] to continue receiving benefits under the agreement, [it] cannot then refuse to perform its part of the bargain"; it must continue to comply with its own obligations under the agreement, including paying royalties. 13 *Williston* § 39:32; *see S&R*, 968 F.2d at 376-378; *Boscorale Operating, LLC* v. *Nautica Apparel, Inc.*, 749 N.Y.S.2d 233, 234-235 (App. Div. 2002); *2Die4Kourt* v. *Hillair Capital Mgmt., LLC*, 2016 WL 4487895, at *5 (C.D. Cal. Aug. 23, 2016), *aff'd*, 692 F. App'x 366 (9th Cir. 2017).

clusive right, for the term of the Agreement, to sell products practicing Tempnology's patents and bearing its trademarks in a particular geographic area (primarily, the United States) and a particular field of use (the Exclusive Cooling Products). JA203-205, 211-218. And Tempnology agreed that, within Mission's exclusive territory, it would not sell such products itself or license others to sell them. JA211-218.

Below, the First Circuit held that Mission's exclusivity rights were not exclusive "rights to intellectual property" within the meaning of §365(n), reasoning that Mission's rights were exclusive only within a particular field of use: "Debtor can use its intellectual property to make and sell products other than those for which the Agreement grants Mission exclusive distribution rights." Pet. App. 15a. Mission sought this Court's review of the First Circuit's holding that its exclusivity rights were not protected by §365(n) (Pet. i (question 2)), but the Court denied review of that question, and Mission accordingly does not challenge the First Circuit's §365(n) holding here. But even if the First Circuit was correct in its interpretation of §365(n), that does not answer the question whether—leaving §365(n) aside—rejection can strip Mission of its exclusivity rights. That distinct issue is encompassed within the question this Court granted: "Whether, under §365 of the Bankruptcy Code, a debtor-licensor's 'rejection' of a license agreement—which 'constitutes a breach of such contract,' 11 U.S.C. §365(g)—terminates rights of the licensee that would survive the licensor's breach under applicable non-bankruptcy law." Pet. i (question 1). It is therefore properly before the Court.[11]

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[11] As noted above, *see supra* n.5, the First Circuit concluded that Mission had waived its argument that, under the logic of

Outside bankruptcy, Mission's exclusivity rights—like its non-exclusive trademark license—limited Tempnology's ability to use or transfer its intellectual property. Tempnology could not sell or assign its intellectual property free of Mission's exclusivity rights—as Tempnology itself recognized by filing for bankruptcy specifically seeking to use rejection to eliminate Mission's rights, JA321-323. And rejection cannot expand the estate's rights in that intellectual property by freeing the estate of the limitations to which Tempnology was subject outside bankruptcy. Moreover, as with the non-exclusive trademark rights, Tempnology's breach of the license agreement outside bankruptcy could not have terminated Mission's exclusivity rights. Rejection therefore could not do so in bankruptcy.

1. As a patent owner, Tempnology had "the right to exclude others from making, using, ... or selling [its] invention throughout the United States." 35 U.S.C. §154(a)(1); *see id.* §271(a) ("[W]hoever without authority ... sells any patented invention ... infringes the patent."). Through the Agreement, Tempnology con-

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Sunbeam, rejection did not strip it of its exclusivity rights even if those rights were not protected by §365(n). Because this Court's answer to the *Sunbeam* question (question 1) would logically apply to both Mission's trademark rights and its exclusivity rights, Mission's petition argued that any issue of waiver with respect to the exclusivity rights should be addressed on remand. Pet. 15 n.4. Tempnology's brief in opposition did not dispute that point or raise waiver as a reason that this Court should not address the effect of rejection on Mission's exclusivity rights. Under this Court's rules, any non-jurisdictional "objection to consideration of a question presented based on what occurred in the proceedings below ... may be deemed waived unless called to the Court's attention in the brief in opposition." S. Ct. R. 15.2; *see, e.g.*, *City of Oklahoma City* v. *Tuttle*, 471 U.S. 808, 816 (1985) (waiver argument by respondent deemed waived where not raised in brief in opposition).

veyed to Mission the right to sell products made from its patented cooling fabric, along with the right to exclude others from doing so within a specific field of use and geographic area. *See generally* Nimmer & Dodd, *Modern Licensing Law* §14:36 (2018) ("Nimmer & Dodd") ("[F]ield-of-use restriction[s]"—which "give[] the licensee rights to use the technology" in "a particular application"—are "routine[]" and "frequently coupled with other restrictions, such as geographic or other limitations.").

As with the non-exclusive trademark license, therefore, Tempnology granted Mission certain sticks in the bundle of sticks that comprised Tempnology's ownership of its intellectual property—the right to sell certain patented and trademarked products and to exclude others, including Tempnology itself, from doing so in the United States. *See, e.g.*, *Ortho Pharm. Corp.* v. *Genetics Inst., Inc.*, 52 F.3d 1026, 1032 (Fed. Cir. 1995) (an exclusive license "makes the licensee a beneficial owner of some identifiable part of the [licensor's] bundle of rights to exclude others"); *Davis* v. *Blige*, 505 F.3d 90, 99 (2d Cir. 2007) (an exclusive license grants the licensee an "exclusive right" that is "superior" to the "owners' rights" to use the intellectual property).

Outside bankruptcy, once it had transferred those rights to Mission through the Agreement, Tempnology could sell or assign its intellectual property only subject to Mission's rights. As with trademark licenses, *see supra* Part II.A.1, the principle that an assignee of a patent "'acquire[s] title subject to prior licenses'" has "'long passed into the text-books.'" *In re Cybernetic Servs., Inc.*, 252 F.3d 1039, 1052 (9th Cir. 2001); *see also, e.g.*, *L.L. Brown Paper Co.* v. *Hydroiloid, Inc.*, 118 F.2d 674, 677 (2d Cir. 1941) (rights of subsequent purchaser of patent were "diminished by [licensee's] right to use

the patented process within the scope of its license"); *Sanofi, S.A.* v. *Med-Tech Veterinarian Prods., Inc.*, 565 F. Supp. 931, 939-940 (D.N.J. 1983) ("the purchaser of a patent" "takes subject to outstanding licenses," even if those "outstanding licenses interfere[] with his right of enjoyment"); Andrew 923 ("[I]f the owner of a patent first licenses and then assigns the patent, the assignee will take subject to the license, and will have no right to terminate the rights of the licensee[.]").

Again, under the principle of *Chicago Board of Trade*, the estate cannot be in any better position than an assignee of the intellectual property outside bankruptcy. Tempnology could transfer only what it had, and once Tempnology conveyed sticks in the bundle of its patent and trademark rights to Mission, the bundle came into the estate missing those sticks. Rejection is not avoidance, and it cannot bring the sticks back into the estate's bundle.

2. Moreover, as with the non-exclusive trademark license, Tempnology's breach of the Agreement outside bankruptcy could not entitle it to revoke Mission's exclusivity rights. Under basic principles of contract law, the licensor's breach, if material, could give the *licensee* the option to terminate the license agreement, but not the breaching licensor. *See supra* Part II.A.2. "A breach of [a licensing] contract entitles the *aggrieved party* to ... end the contract because of breach by the other party" or seek available remedies. Nimmer & Dodd §11:23 (emphasis added). "Beyond doubt," however, neither patent nor contract law "would permit rescission [of a patent license] by the breaching party against a performing Other Party." Westbrook 309. The same result should obtain in bankruptcy.

III. The First Circuit's And Respondent's Remaining Arguments Fail

A. Section 365(n) Does Not Give Rise To Any "Negative Inference" Regarding Trademarks

Congress responded to *Lubrizol* by setting out a federal rule in §365(n) protecting licensees' rights in certain kinds of intellectual property, but omitted trademarks from the definition of "intellectual property," §101(35A). A handful of courts have concluded, and Tempnology suggests (Opp. 9), that §365(n) thus gives rise to a negative inference that Congress was endorsing the rule of *Lubrizol* for trademarks. But when §365 is considered as a whole and in light of basic bankruptcy principles—as well as the legislative history of §365(n)—it is evident that such a negative inference makes no sense.

Congress has at various times added provisions to §365 dealing with specific types of executory contracts that present the "two-asset" problem, including real-property leases, §365(h), contracts for the sale of real property, §365(i) and §365(j), and intellectual property licenses, §365(n). Often, Congress was responding to a specific court decision or decisions that treated rejection as an avoiding power, stripping away the counterparty's rights in the underlying asset. Andrew 902-903, 911-912. "[W]henever Congress has been confronted with the consequences of the avoiding-power rejection doctrine in a particular context, it has expressed its disapproval of the doctrine with a specific provision." *Id.* at 928. That pattern of responding to specific problems as they arise creates no "negative inference" that "Congress has endorsed avoiding-power rejection in all [other] contexts." *Id.*

The legislative history of §365(n) confirms that reading. When it enacted §365(n), Congress repudiated *Lubrizol*'s interpretation of the effect of rejection—in no way did it endorse *Lubrizol*. As the Senate Report explained, §365(n) was intended to clarify the law and correct *Lubrizol*'s error, not to create a new exception to a general rule of avoiding-power rejection. The bill's purpose was "*to make clear* that the rights of an intellectual property licensee to use the licensed property cannot be unilaterally cut off as a result of the rejection of the license," "a result ... that was never intended by Congress in enacting [§]365." S. Rep. No. 100-505, at 3200 (1988) (emphasis added). The Report explained that §365 merely permits the debtor "to breach ... [its] affirmative ongoing performance of the contract." *Id.* at 3201. "Congress never anticipated that ... the licensee would [also] lose ... any right ... to continue to use the intellectual property as originally agreed." *Id.* at 3201-3202. Accordingly, the bill "*correct[ed] the perception of some courts* that [§]365 was ever intended to be a mechanism for stripping innocent licensee[s] of rights" to the licensed intellectual property. *Id.* at 3203 (emphasis added).

The House Report similarly repudiated *Lubrizol*. It explained that, while a more "comprehensive reworking of [§]365" would be the "best way in the long run of dealing with this and other areas for which special exceptions to [§]365 have been created," the "potential chilling effect on the licensing of intellectual property" posed a "serious[] ... problem" that warranted taking action specific to such licenses immediately. H.R. Rep. No. 100-1012, at 3-4 & nn.1-2, 6-7 (1988).[12]

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[12] The House Report endorsed the hearing testimony of George Hahn of the National Bankruptcy Conference, who testi-

It is of course a traditional canon of statutory interpretation that courts should avoid interpretations that would render statutory provisions superfluous. *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 566 U.S. 639, 645 (2012). But the explicit protections in §365(h) and §365(n) (as well as §§365(i)-(j)) for the rights of counterparties to particular types of contracts are not rendered superfluous under *Sunbeam*'s view of rejection. Rather, §365 sets forth "a statutory scheme in which the specific provision embraced within a general one is not superfluous, because it creates a so-called safe harbor." *RadLAX*, 566 U.S. at 647.

Congress not infrequently responds to a specific concern regarding the application of a statute by enacting such a "safe harbor" provision clarifying the law with respect to that specific concern, rather than rewriting the entire statute—an action that should not give rise to any negative inference regarding the meaning of the statute. "[A]mendments to a statute" addressing an area of "dispute or ambiguity" can "be an indication that [the] subsequent amendment is intended to clarify, rather than change, the existing law." *Brown* v. *Marquette Sav. & Loan Ass'n*, 686 F.2d 608, 615 (7th Cir. 1982) (citing 2A *Sutherland on Statutory Construction* §49.11 (1974)); *see also, e.g.*, *O'Gilvie* v. *United States*, 519 U.S. 79, 89 (1996) (Tax Code provision stating that exemption for personal-injury damages did not

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fied that *Lubrizol* "misconstrued the consequences of rejection"; while he believed "the better solution" was a complete revision of §365, he testified that *Lubrizol*'s "chilling effect" on licensing needed to be addressed immediately, rather than "wait[ing] until we have a complete overhaul." *Intellectual Property Contracts in Bankruptcy: Hearing on H.R. 4657*, 100th Cong. 90-91, 100-101 (1988); *accord* 134 Cong. Rec. H9,304 (daily ed. Oct. 3, 1988) (statement of Rep. Fish).

apply to punitive damages for non-physical injuries did not create negative inference that exemption otherwise applied to punitive damages, but merely "clarif[ied] the matter in respect to nonphysical injuries" given "uncertain[ty]" under "then-current law"); *Viacom Int'l, Inc.* v. *YouTube, Inc.*, 676 F.3d 19, 27 (2d Cir. 2012) ("[T]o update domestic copyright law for the digital age," "[r]ather than embarking upon a wholesale clarification of various copyright doctrines, Congress ... create[d] a series of safe harbors for certain common activities of service providers[.]" (internal quotation marks and brackets omitted)).

Section 365(n) provides licensees just such a safe harbor. It sets out a uniform federal rule specifying the rights of licensees and licensors following rejection, making it unnecessary for bankruptcy courts to look to non-bankruptcy law to determine those rights. Moreover, that uniform rule departs in some respects from the non-bankruptcy law that would otherwise be applicable, providing additional benefits to debtors. *See, e.g.*, §365(n)(2)(C) (prohibiting setoff of licensee's breach-of-contract damages against royalties owed to debtor-licensor). It is therefore not surplusage.

The Senate Report explained that trademark licenses were not included in §365(n) because "it was determined to postpone congressional action" to permit "more extensive study." S. Rep. No. 100-505, at 3204 (noting that "such contracts raise issues beyond the scope of this legislation," such as "control of the quality of the products ... sold by the licensee"). But in deferring the question of whether and how to draft a uniform federal provision governing trademark licenses, Congress in no way suggested that it intended rejection to strip trademark licensees of their basic right to continue using the trademarks. To the contrary, it empha-

sized that "rejection [of trademark licenses] is of concern because of the interpretation of [§]365 by the *Lubrizol* court." *Id.*; *see Sunbeam*, 686 F.3d at 375; *Exide*, 607 F.3d at 966-967 (Ambro, J., concurring). And it warned that it did not "intend any inference to be drawn" concerning matters §365(n) did not address. S. Rep. No. 100-505, at 3204.

Section 365(n) thus does not give rise to any "negative inference" that *Lubrizol*'s rule governs rights to intellectual property, such as trademark rights, that §365(n) does not explicitly protect. *Sunbeam*, 686 F.3d at 375 (the omission of trademarks from §365(n) "is just an omission" that "means that §365(n) does not affect trademarks one way or the other"); *Exide*, 607 F.3d at 966-967 (Ambro, J., concurring) (same); Baird 118, 123 ("[s]etting out the rule explicitly" in §365(h) and §365(n) "does not require the inference that Congress was repudiating the general principle elsewhere"). Indeed, "[d]rawing a negative inference" that intellectual property license rights not explicitly protected by §365(n) can be terminated by rejection "assumes a notion of the rejection power that has no basis in history and makes little sense." Baird 123.[13]

"Avoiding-power rejection is ... simply more freight than negative inference will bear. It requires

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[13] *Lubrizol* itself erroneously relied on such a negative inference, reasoning that §365(h)'s explicit protection for lessees' rights was an exception to the general rule of rejection and that rejection of a license agreement must therefore terminate the licensee's rights. 756 F.2d at 1048; *accord* Wilton & Devore, *Trademark Licensing in the Shadow of Bankruptcy*, 68 Bus. Law. 739, 750-751, 774-775 (2013). Congress rejected that reading in adopting §365(n), explaining that §365(h) merely "clarified" the general rule of rejection as applied to real property leases. S. Rep. No. 100-505, at 3203.

that 'rejection' be assigned a meaning fundamentally at odds with both the history and purpose of executory contracts doctrine, with no legislative history in support.... That absurdity is not compelled by the statute, and should not be read between its lines." Andrew 929.

B. Licensors' Quality Control Obligations Under Trademark Law Do Not Warrant Treating Trademark Licenses Differently From Other Intellectual Property Licenses

The First Circuit's decision relied heavily on its belief that termination of licensees' rights is necessary to avoid imposing burdensome obligations on the debtor-licensor. Pet. App. 23a-27a. Specifically, the panel majority observed that "effective licensing of a trademark requires that the trademark owner ... monitor and exercise control over the quality of the goods sold to the public under cover of the trademark," and that failure to do so may "jeopardiz[e] the continued validity of the owner's own trademark rights." *Id.* 23a. It then opined that "[t]he Seventh Circuit's approach [in *Sunbeam*] would ... force Debtor to choose between performing executory obligations arising from the continuance of the license or risking the permanent loss of its trademarks, thereby diminishing their value to Debtor." *Id.* 24a. That analysis does not withstand scrutiny.

1. As an initial matter, the First Circuit's concern about trademark-monitoring burdens is entirely misplaced in this case. Tempnology licensed its trademarks to multiple other distributors at the same time it was seeking to rescind the license it had granted Mission. *See supra* pp. 9-11. Tempnology's evident goal in rejecting the Agreement was not to avoid the "burden" of monitoring licensees' use of its trademarks; it was to eliminate Mission as one of those licensees. The same

was true in *Sunbeam* and *Exide*: In each case, the debtor's successor wanted to avoid competition with the trademark licensee, not the burden of monitoring its mark. *Sunbeam*, 686 F.3d at 374; *Exide*, 607 F.3d at 961. That is often the reason licensors seek rejection of a license agreement: to eliminate the licensee's rights so that the licensor can strike what it perceives to be a more advantageous deal with a new buyer or licensee.

2. In any event, the First Circuit was wrong in believing that the "burden" of monitoring a licensee's use of its trademarks is the kind of burden rejection permits the estate to shed.

To be sure, a trademark licensor must maintain "'quality control of the goods and services sold under the trademark by the licensee'" to be certain that it will retain ownership of its mark. *Barcamerica Int'l USA Trust* v. *Tyfield Importers, Inc.*, 289 F.3d 589, 595 (9th Cir. 2002); *see* 15 U.S.C. §1055 ("legitimate[]," nondeceptive use of a mark "by related companies" will "not affect the validity of such mark"); *id.* §1127 (defining "related company" as "any person whose use of a mark is controlled by the owner of the mark with respect to the nature and quality of the goods ... on ... which the mark is used"). "[W]here the licensor fails to exercise adequate quality control over [its] licensee, 'a court may find that the trademark owner has abandoned the trademark'" under the "naked licensing" doctrine. *Barcamerica*, 289 F.3d at 596.

But that quality-control burden is imposed by trademark law generally applicable to all trademark owners, not by contract. And it is not a performance obligation owed to the licensee, but an action taken for the benefit of the licensor, to preserve the value of its mark. As one court put it, "the legal rigors of trade-

mark policing, not contractual obligations imposed upon the licensor to monitor its trademarks[,] are the source of the debtor's burdens." *In re SIMA Int'l, Inc.*, 2018 WL 2293705, at *7 n.24 (Bankr. D. Conn. May 17, 2018) (rejecting the First Circuit's analysis).

The First Circuit's notion that respecting a licensee's trademark rights "force[s]" a debtor to "perform[] executory obligations arising from the continuance of the license" is thus wrong because it conflates contractual obligations with burdens arising from generally applicable law. Pet. App. 24a. If Tempnology had had an affirmative obligation *under the Agreement* to monitor Mission's use of its marks, rejection would have relieved Tempnology's estate of that obligation.[14] But that is all rejection can do; it relieves the estate of the debtor's obligations to perform *under contracts*, while creating a pre-petition breach-of-contract claim against the debtor. It does not permit the estate to repudiate any and all responsibilities that might impede the debtor's reorganization or grant the estate an exemption from burdens imposed on property owners by generally applicable law. To the contrary, the trustee is required to manage the property of the estate in accordance with applicable law. *See* 28 U.S.C. §959(b).

3. Moreover, recognizing that a trademark licensee's rights survive rejection does not *compel* the estate to monitor the trademark. Whether to do so is an economic decision that the trustee can make in the best interest of the estate.

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[14] In fact, the Agreement did not impose any such duty on Tempnology. At most, it gave a Tempnology a right, but not an obligation, to monitor and control Mission's use of its trademarks. JA237-238 (Agreement §15(d)).

A trademark owner chooses to monitor the use of its mark for its own benefit, as an investment in preserving the mark. It will presumably choose to monitor whenever the mark has sufficient value that the investment makes financial sense. In bankruptcy, the trademark becomes an estate asset, and the trustee will be able to decide whether the mark has sufficient value that it is worth incurring the cost of monitoring to preserve that value. If the trademark does not have even that minimal value to the estate, the trustee should instead abandon it. *See* §554(a) (authorizing the trustee, with court approval, to "abandon any property of the estate that is burdensome to the estate" or "of inconsequential value").

That choice is no different than other choices trustees make every day regarding property of the bankruptcy estate: either to incur the necessary costs to preserve the property's value or, if those costs outweigh the benefits, to abandon the property. Rejection cannot relieve the estate of such choices.

4. Finally, monitoring is unlikely to be a significant burden in any event. The standards for licensor monitoring have, in practice, become increasingly lenient. A licensor demonstrating "minimal quality control" efforts will typically defeat an argument that it has abandoned its mark. *Kentucky Fried Chicken Corp.* v. *Diversified Packaging Corp.*, 549 F.2d 368, 387 (5th Cir. 1977). Courts have "generally proven reluctant to declare licenses invalid" so long as there is "any sign of control." Calboli, *The Sunset of 'Quality Control' in Modern Trademark Licensing*, 57 Am. U. L. Rev. 341, 370 (2007); *see also* Nguyen, *Bankrupting Trademarks*, 37 U.C. Davis L. Rev. 1267, 1281 (2004) ("Nguyen").

Moreover, licensors familiar with the production standards of their licensees are regularly permitted to rely on the representations and efforts of their licensees to satisfy their monitoring requirements. *See, e.g.*, *Restatement (Third) of Unfair Competition* §33 cmt. c (1995) ("If the trademark owner is justified in relying on the reputation and expertise of the licensee, the existence of contractual obligations undertaken by the licensee may be sufficient in itself to constitute reasonable quality control."); *Barcamerica*, 289 F.3d at 596.

Trademark licensees have substantial incentives to maintain quality-control standards. A licensee should be just as motivated to "control the quality of [its] goods and services as the trademark owner itself because, if the licensee puts out shoddy products and services, consumers will not buy them." Saunders, *Should the U.S. Bankruptcy Code Be Amended to Protect Trademark Licensees?*, 94 Trademark Rep. 934, 940 (2004). Often, the licensee has "invested substantial resources in building the goodwill of the trademark" and would not be inclined to "destroy that goodwill by selling goods or products of materially different quality under the trademark." Nguyen 1313. Nor would any rational trademark licensee want to see the licensor lose ownership of the mark under the naked-licensing doctrine: Failing to maintain quality control could give a third-party infringer (the typical plaintiff in a "naked licensing" suit) a basis to strip the trademark from the licensor and make it available for public use, greatly diminishing the mark's value to the licensee.

C. Chapter 11's Reorganizational Objective Does Not Justify Treating Rejection As An Avoidance Power

The First Circuit also claimed that Chapter 11's goal of facilitating reorganization supported its view of rejection. Pet. App. 22a. That, too, is wrong. As an initial matter, §365 applies to all bankruptcy cases, not just Chapter 11 reorganizations, and rejection cannot mean one thing in Chapter 11 and another in Chapter 7. *See, e.g.*, *Clark* v. *Martinez*, 534 U.S. 371, 378 (2005) (where statutory language applies to multiple categories, giving the "same words a different meaning for each category would be to invent a statute rather than interpret one"); Baird 123.

It is nonetheless true, as this Court has observed, that §365 is important "to the basic purpose [of] a Chapter 11 reorganization, because rejection can release the debtor's estate from burdensome obligations that can impede a successful reorganization." *Bildisco*, 465 U.S. at 528. But §365 furthers the broad goal of successful reorganization in a specific way: by ensuring that the estate need not assume the debtor's duty to perform under executory contracts if doing so would cost the estate more than it would receive from the counterparty. In *Bildisco*, for example, §365 ensured that a reorganizing business was not "saddled automatically with the debtor's prior collective-bargaining agreement" that agreed to pay future wages and benefits at levels that changed market conditions might render unsustainable. *Id.* at 518, 528.

No general policy in favor of reorganization supports reading §365, in contravention of its text and purpose, to go farther and give the trustee the power to claw back rights the debtor conveyed away before

bankruptcy, without meeting the requirements for avoidance. To be sure, permitting the estate to revoke pre-bankruptcy licenses and sell or relicense its intellectual property free of those licenses might enable the estate to realize more value for that intellectual property. But that rationale "proves far too much": It would justify reading the Bankruptcy Code to terminate *all* rights of non-debtors in the debtor's assets. Andrew 930; *see* Baird 123 ("Arguments ... giving the trustee the power to recapture rights that could never be taken from a third party outside of bankruptcy should not ... rest on ... a bankruptcy policy in favor of rehabilitating the debtor.").

As this Court has noted, "'[n]o legislation pursues its purposes at all costs,'" *American Express Co.* v. *Italian Colors Rest.*, 570 U.S. 228, 234 (2013), and the Bankruptcy Code is no exception. It does not give debtors the power to do anything and everything that might make reorganizing easier. And it does not give debtors the extraordinary power Tempnology argues for here.

CONCLUSION

The judgment of the First Circuit should be reversed.

Respectfully submitted.

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STATUTORY ADDENDUM

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11 U.S.C. § 365

§ 365. Executory contracts and unexpired leases

(a) Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.

(b)(1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee—

> **(A)** cures, or provides adequate assurance that the trustee will promptly cure, such default other than a default that is a breach of a provision relating to the satisfaction of any provision (other than a penalty rate or penalty provision) relating to a default arising from any failure to perform nonmonetary obligations under an unexpired lease of real property, if it is impossible for the trustee to cure such default by performing nonmonetary acts at and after the time of assumption, except that if such default arises from a failure to operate in accordance with a nonresidential real property lease, then such default shall be cured by performance at and after the time of assumption in accordance with such lease, and pecuniary losses resulting from such default shall be compensated in accordance with the provisions of this paragraph;
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> **(B)** compensates, or provides adequate assurance that the trustee will promptly compen-

sate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and

(C) provides adequate assurance of future performance under such contract or lease.

(2) Paragraph (1) of this subsection does not apply to a default that is a breach of a provision relating to—

(A) the insolvency or financial condition of the debtor at any time before the closing of the case;

(B) the commencement of a case under this title;

(C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement; or

(D) the satisfaction of any penalty rate or penalty provision relating to a default arising from any failure by the debtor to perform nonmonetary obligations under the executory contract or unexpired lease.

(3) For the purposes of paragraph (1) of this subsection and paragraph (2)(B) of subsection (f), adequate assurance of future performance of a lease of real property in a shopping center includes adequate assurance—

(A) of the source of rent and other consideration due under such lease, and in the case of an assignment, that the financial condition and operating performance of the proposed assignee and its guarantors, if any, shall be similar to the financial condition and operating performance

of the debtor and its guarantors, if any, as of the time the debtor became the lessee under the lease;

(B) that any percentage rent due under such lease will not decline substantially;

(C) that assumption or assignment of such lease is subject to all the provisions thereof, including (but not limited to) provisions such as a radius, location, use, or exclusivity provision, and will not breach any such provision contained in any other lease, financing agreement, or master agreement relating to such shopping center; and

(D) that assumption or assignment of such lease will not disrupt any tenant mix or balance in such shopping center.

(4) Notwithstanding any other provision of this section, if there has been a default in an unexpired lease of the debtor, other than a default of a kind specified in paragraph (2) of this subsection, the trustee may not require a lessor to provide services or supplies incidental to such lease before assumption of such lease unless the lessor is compensated under the terms of such lease for any services and supplies provided under such lease before assumption of such lease.

(c) The trustee may not assume or assign any executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if—

(1)(A) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to an

entity other than the debtor or the debtor in possession, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and

(B) such party does not consent to such assumption or assignment; or

(2) such contract is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor, or to issue a security of the debtor; or

(3) such lease is of nonresidential real property and has been terminated under applicable nonbankruptcy law prior to the order for relief.

(d)(1) In a case under chapter 7 of this title, if the trustee does not assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor within 60 days after the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such contract or lease is deemed rejected.

(2) In a case under chapter 9, 11, 12, or 13 of this title, the trustee may assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor at any time before the confirmation of a plan but the court, on the request of any party to such contract or lease, may order the trustee to determine within a specified period of time whether to assume or reject such contract or lease.

(3) The trustee shall timely perform all the obligations of the debtor, except those specified in section 365(b)(2), arising from and after the order for relief under any unexpired lease of nonresidential real

property, until such lease is assumed or rejected, notwithstanding section 503(b)(1) of this title. The court may extend, for cause, the time for performance of any such obligation that arises within 60 days after the date of the order for relief, but the time for performance shall not be extended beyond such 60-day period. This subsection shall not be deemed to affect the trustee's obligations under the provisions of subsection (b) or (f) of this section. Acceptance of any such performance does not constitute waiver or relinquishment of the lessor's rights under such lease or under this title.

(4)(A) Subject to subparagraph (B), an unexpired lease of nonresidential real property under which the debtor is the lessee shall be deemed rejected, and the trustee shall immediately surrender that nonresidential real property to the lessor, if the trustee does not assume or reject the unexpired lease by the earlier of—

> **(i)** the date that is 120 days after the date of the order for relief; or
>
> **(ii)** the date of the entry of an order confirming a plan.

(B)(i) The court may extend the period determined under subparagraph (A), prior to the expiration of the 120-day period, for 90 days on the motion of the trustee or lessor for cause.

> **(ii)** If the court grants an extension under clause (i), the court may grant a subsequent extension only upon prior written consent of the lessor in each instance.

(5) The trustee shall timely perform all of the obligations of the debtor, except those specified in sec-

tion 365(b)(2), first arising from or after 60 days after the order for relief in a case under chapter 11 of this title under an unexpired lease of personal property (other than personal property leased to an individual primarily for personal, family, or household purposes), until such lease is assumed or rejected notwithstanding section 503(b)(1) of this title, unless the court, after notice and a hearing and based on the equities of the case, orders otherwise with respect to the obligations or timely performance thereof. This subsection shall not be deemed to affect the trustee's obligations under the provisions of subsection (b) or (f). Acceptance of any such performance does not constitute waiver or relinquishment of the lessor's rights under such lease or under this title.

(e)(1) Notwithstanding a provision in an executory contract or unexpired lease, or in applicable law, an executory contract or unexpired lease of the debtor may not be terminated or modified, and any right or obligation under such contract or lease may not be terminated or modified, at any time after the commencement of the case solely because of a provision in such contract or lease that is conditioned on—

(A) the insolvency or financial condition of the debtor at any time before the closing of the case;

(B) the commencement of a case under this title; or

(C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement.

(2) Paragraph (1) of this subsection does not apply to an executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if—

(A)(i) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to the trustee or to an assignee of such contract or lease, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and

(ii) such party does not consent to such assumption or assignment; or

(B) such contract is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor, or to issue a security of the debtor.

(f)(1) Except as provided in subsections (b) and (c) of this section, notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law, that prohibits, restricts, or conditions the assignment of such contract or lease, the trustee may assign such contract or lease under paragraph (2) of this subsection.

(2) The trustee may assign an executory contract or unexpired lease of the debtor only if—

(A) the trustee assumes such contract or lease in accordance with the provisions of this section; and

(B) adequate assurance of future performance by the assignee of such contract or lease is provided, whether or not there has been a default in such contract or lease.

(3) Notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law that terminates or modifies, or permits a party other than the debtor to terminate or modify, such contract or lease or a right or obligation under such contract or lease on account of an assignment of such contract or lease, such contract, lease, right, or obligation may not be terminated or modified under such provision because of the assumption or assignment of such contract or lease by the trustee.

(g) Except as provided in subsections (h)(2) and (i)(2) of this section, the rejection of an executory contract or unexpired lease of the debtor constitutes a breach of such contract or lease—

(1) if such contract or lease has not been assumed under this section or under a plan confirmed under chapter 9, 11, 12, or 13 of this title, immediately before the date of the filing of the petition; or

(2) if such contract or lease has been assumed under this section or under a plan confirmed under chapter 9, 11, 12, or 13 of this title—

(A) if before such rejection the case has not been converted under section 1112, 1208, or 1307 of this title, at the time of such rejection; or

(B) if before such rejection the case has been converted under section 1112, 1208, or 1307 of this title—

(i) immediately before the date of such conversion, if such contract or lease was assumed before such conversion; or

(ii) at the time of such rejection, if such contract or lease was assumed after such conversion.

(h)(1)(A) If the trustee rejects an unexpired lease of real property under which the debtor is the lessor and—

(i) if the rejection by the trustee amounts to such a breach as would entitle the lessee to treat such lease as terminated by virtue of its terms, applicable nonbankruptcy law, or any agreement made by the lessee, then the lessee under such lease may treat such lease as terminated by the rejection; or

(ii) if the term of such lease has commenced, the lessee may retain its rights under such lease (including rights such as those relating to the amount and timing of payment of rent and other amounts payable by the lessee and any right of use, possession, quiet enjoyment, subletting, assignment, or hypothecation) that are in or appurtenant to the real property for the balance of the term of such lease and for any renewal or extension of such rights to the extent that such rights are enforceable under applicable nonbankruptcy law.

(B) If the lessee retains its rights under subparagraph (A)(ii), the lessee may offset against the rent reserved under such lease for the balance of the term after the date of the rejection

of such lease and for the term of any renewal or extension of such lease, the value of any damage caused by the nonperformance after the date of such rejection, of any obligation of the debtor under such lease, but the lessee shall not have any other right against the estate or the debtor on account of any damage occurring after such date caused by such nonperformance.

(C) The rejection of a lease of real property in a shopping center with respect to which the lessee elects to retain its rights under subparagraph (A)(ii) does not affect the enforceability under applicable nonbankruptcy law of any provision in the lease pertaining to radius, location, use, exclusivity, or tenant mix or balance.

(D) In this paragraph, "lessee" includes any successor, assign, or mortgagee permitted under the terms of such lease.

(2)(A) If the trustee rejects a timeshare interest under a timeshare plan under which the debtor is the timeshare interest seller and—

(i) if the rejection amounts to such a breach as would entitle the timeshare interest purchaser to treat the timeshare plan as terminated under its terms, applicable nonbankruptcy law, or any agreement made by timeshare interest purchaser, the timeshare interest purchaser under the timeshare plan may treat the timeshare plan as terminated by such rejection; or

(ii) if the term of such timeshare interest has commenced, then the timeshare inter-

est purchaser may retain its rights in such timeshare interest for the balance of such term and for any term of renewal or extension of such timeshare interest to the extent that such rights are enforceable under applicable nonbankruptcy law.

(B) If the timeshare interest purchaser retains its rights under subparagraph (A), such timeshare interest purchaser may offset against the moneys due for such timeshare interest for the balance of the term after the date of the rejection of such timeshare interest, and the term of any renewal or extension of such timeshare interest, the value of any damage caused by the nonperformance after the date of such rejection, of any obligation of the debtor under such timeshare plan, but the timeshare interest purchaser shall not have any right against the estate or the debtor on account of any damage occurring after such date caused by such nonperformance.

(i)(1) If the trustee rejects an executory contract of the debtor for the sale of real property or for the sale of a timeshare interest under a timeshare plan, under which the purchaser is in possession, such purchaser may treat such contract as terminated, or, in the alternative, may remain in possession of such real property or timeshare interest.

(2) If such purchaser remains in possession—

(A) such purchaser shall continue to make all payments due under such contract, but may,[1] offset against such payments any damages oc-

---

[1] So in original. The comma probably should not appear.

curring after the date of the rejection of such contract caused by the nonperformance of any obligation of the debtor after such date, but such purchaser does not have any rights against the estate on account of any damages arising after such date from such rejection, other than such offset; and

(B) the trustee shall deliver title to such purchaser in accordance with the provisions of such contract, but is relieved of all other obligations to perform under such contract.

(j) A purchaser that treats an executory contract as terminated under subsection (i) of this section, or a party whose executory contract to purchase real property from the debtor is rejected and under which such party is not in possession, has a lien on the interest of the debtor in such property for the recovery of any portion of the purchase price that such purchaser or party has paid.

(k) Assignment by the trustee to an entity of a contract or lease assumed under this section relieves the trustee and the estate from any liability for any breach of such contract or lease occurring after such assignment.

(l) If an unexpired lease under which the debtor is the lessee is assigned pursuant to this section, the lessor of the property may require a deposit or other security for the performance of the debtor's obligations under the lease substantially the same as would have been required by the landlord upon the initial leasing to a similar tenant.

(m) For purposes of this section 365 and sections 541(b)(2) and 362(b)(10), leases of real property shall include any rental agreement to use real property.

(n)(1) If the trustee rejects an executory contract under which the debtor is a licensor of a right to intellectual property, the licensee under such contract may elect—

> **(A)** to treat such contract as terminated by such rejection if such rejection by the trustee amounts to such a breach as would entitle the licensee to treat such contract as terminated by virtue of its own terms, applicable nonbankruptcy law, or an agreement made by the licensee with another entity; or
>
> **(B)** to retain its rights (including a right to enforce any exclusivity provision of such contract, but excluding any other right under applicable nonbankruptcy law to specific performance of such contract) under such contract and under any agreement supplementary to such contract, to such intellectual property (including any embodiment of such intellectual property to the extent protected by applicable nonbankruptcy law), as such rights existed immediately before the case commenced, for—
>
> > **(i)** the duration of such contract; and
> >
> > **(ii)** any period for which such contract may be extended by the licensee as of right under applicable nonbankruptcy law.

(2) If the licensee elects to retain its rights, as described in paragraph (1)(B) of this subsection, under such contract—

(A) the trustee shall allow the licensee to exercise such rights;

(B) the licensee shall make all royalty payments due under such contract for the duration of such contract and for any period described in paragraph (1)(B) of this subsection for which the licensee extends such contract; and

(C) the licensee shall be deemed to waive—

(i) any right of setoff it may have with respect to such contract under this title or applicable nonbankruptcy law; and

(ii) any claim allowable under section 503(b) of this title arising from the performance of such contract.

(3) If the licensee elects to retain its rights, as described in paragraph (1)(B) of this subsection, then on the written request of the licensee the trustee shall—

(A) to the extent provided in such contract, or any agreement supplementary to such contract, provide to the licensee any intellectual property (including such embodiment) held by the trustee; and

(B) not interfere with the rights of the licensee as provided in such contract, or any agreement supplementary to such contract, to such intellectual property (including such embodiment) including any right to obtain such intellectual property (or such embodiment) from another entity.

(4) Unless and until the trustee rejects such contract, on the written request of the licensee the trustee shall—

(A) to the extent provided in such contract or any agreement supplementary to such contract—

(i) perform such contract; or

(ii) provide to the licensee such intellectual property (including any embodiment of such intellectual property to the extent protected by applicable nonbankruptcy law) held by the trustee; and

(B) not interfere with the rights of the licensee as provided in such contract, or any agreement supplementary to such contract, to such intellectual property (including such embodiment), including any right to obtain such intellectual property (or such embodiment) from another entity.

(o) In a case under chapter 11 of this title, the trustee shall be deemed to have assumed (consistent with the debtor's other obligations under section 507), and shall immediately cure any deficit under, any commitment by the debtor to a Federal depository institutions regulatory agency (or predecessor to such agency) to maintain the capital of an insured depository institution, and any claim for a subsequent breach of the obligations thereunder shall be entitled to priority under section 507. This subsection shall not extend any commitment that would otherwise be terminated by any act of such an agency.

(p)(1) If a lease of personal property is rejected or not timely assumed by the trustee under subsection (d), the

leased property is no longer property of the estate and the stay under section 362(a) is automatically terminated.

(2)(A) If the debtor in a case under chapter 7 is an individual, the debtor may notify the creditor in writing that the debtor desires to assume the lease. Upon being so notified, the creditor may, at its option, notify the debtor that it is willing to have the lease assumed by the debtor and may condition such assumption on cure of any outstanding default on terms set by the contract.

(B) If, not later than 30 days after notice is provided under subparagraph (A), the debtor notifies the lessor in writing that the lease is assumed, the liability under the lease will be assumed by the debtor and not by the estate.

(C) The stay under section 362 and the injunction under section 524(a) (2) shall not be violated by notification of the debtor and negotiation of cure under this subsection.

(3) In a case under chapter 11 in which the debtor is an individual and in a case under chapter 13, if the debtor is the lessee with respect to personal property and the lease is not assumed in the plan confirmed by the court, the lease is deemed rejected as of the conclusion of the hearing on confirmation. If the lease is rejected, the stay under section 362 and any stay under section 1301 is automatically terminated with respect to the property subject to the lease.

No. 17-1657

In the Supreme Court of the United States

MISSION PRODUCT HOLDINGS, INC., PETITIONER

v.

TEMPNOLOGY, LLC, N/K/A OLD COLD LLC

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

Bankruptcy Code Section 365(a) gives the trustee the choice to assume or reject executory contracts. In *NLRB* v. *Bildisco & Bildisco*, 465 U.S. 513, 532 (1984), this Court held that such a contract, if not assumed, "is not an enforceable contract" of the estate. Rejection is deemed a pre-petition breach of contract; the counterparty is a creditor and is entitled to a pre-petition claim for damages. Pre-bankruptcy, respondent entered into a co-marketing agreement granting petitioner a non-exclusive license to use respondent's trademark and imposing related obligations on respondent to maintain quality control of its trademark. After filing for bankruptcy, respondent, as debtor in possession acting as trustee, rejected the agreement. The Court granted review only on the first question presented in the Petition:

1. Whether, notwithstanding a trustee's rejection of a trademark "license agreement," that license agreement remains enforceable against the estate.

The Court declined review of a second question, regarding whether petitioner's exclusive product distribution rights under the agreement qualified as a patent license protected under Bankruptcy Code Section 365(n). The denial of certiorari on the second question raises a threshold question of mootness:

2. Whether there is a justiciable controversy over enforceability of an expired, non-exclusive trademark license against a bankruptcy estate, when the licensee made no infringing sales between the rejection of the license and its expiration, and there is no assertion of post-rejection interference by the estate.

AMENDED CORPORATE DISCLOSURE STATEMENT

Respondent is Old Cold LLC, formerly known as Tempnology LLC. Old Cold LLC is owned by Frigid Fabrics LLC; Schleicher & Stebbins Hotels L.L.C.; Blue Wave Trading LLC; Cool Comfort Technologies, Inc.; and Mighty Moose LLC, none of which is publicly held. No publicly held corporation has a 10% or greater ownership interest in respondent.

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In the Supreme Court of the United States

No. 17-1657

MISSION PRODUCT HOLDINGS, INC., PETITIONER

v.

TEMPNOLOGY, LLC, N/K/A OLD COLD LLC

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENT

INTRODUCTION

Bankruptcy Code Section 365(a) grants a bankruptcy trustee an extraordinary authority that does not exist outside of bankruptcy—the choice to assume or reject the debtor's executory contracts. This Court's construction of Section 365(a) and (g) makes clear that those provisions mean what they say. Upon assumption, the entire contract, with all its benefits and burdens, is enforceable against the estate; by contrast, a rejected contract is "not an enforceable contract." *NLRB* v. *Bildisco & Bildisco*, 465 U.S. 513, 532 (1984). Instead, the Code provides that a rejected contract is deemed breached, and the counterparty's remedy is a pre-petition breach-of-contract claim, 11 U.S.C. 365(g), consistent with the Code's policy to administer and discharge even "contingent" claims against the debtor, 11 U.S.C. 101(5).

Recognizing that this general rule may sometimes be unduly harsh, Congress has established limited statutory "exceptions" that grant counterparties to certain types of contracts, including real estate leases and patent licenses, the choice to treat the contract as terminated, per the general rule, or to retain certain rights specified by the exceptions. Neither trademark licenses nor exclusive distribution rights fall within those exceptions. Indeed, on multiple occasions, Congress has considered but declined to adopt an exception for trademark licenses.

Contrary to the statute's terms and this Court's holding in *Bildisco*, under petitioner's construction, a rejected contract would remain "an enforceable contract" against the debtor, at least insofar as the counterparty could successfully characterize the specific obligation in question as a "property interest" or a "negative covenant." Petitioner's argument is not only inconsistent with the Code's text, it would also violate the canon of *expressio unius est exclusio alterius* and impermissibly render the statutory exceptions superfluous.

Petitioner's arguments also fail based on the express terms of the parties' contract. Consistent with background principles of trademark law that require unity of ownership of trademarks, the contract specifies that petitioner obtained no property interest in respondent's trademarks. Nor is the license a mere "negative covenant." Under state and federal law (and the contract), respondent retained a *duty* to maintain quality control of the mark. If the trademark were severed from respondent's ongoing affirmative obligation, the license would be invalid. Similarly, petitioner's contractual

right as exclusive distributor of certain products in a defined territory gives petitioner no property right that distinguishes it from any other contractual rights.

While petitioner's arguments fail on the merits, the Court should not reach them because the only issue properly before the Court is moot. The Court denied review of the ruling below concerning petitioner's exclusive distribution rights. Petitioner erroneously asserts that rejection's effect on petitioner's exclusive distribution rights is within the question on which the Court granted review. But petitioner's premise—that exclusive distribution rights are a "license" to respondent's intellectual property—was rejected by the lower courts, and this Court denied review on that issue in the Petition's second question presented. Pet. i. If exclusive distribution rights were a license to intellectual property, Section 365(n) would have protected it. Pet. App. 12a-20a. The court of appeals rejected petitioner's contention as contrary to the contract's language, and this Court declined to review that fact-based question. Petitioner (Br. 41-42 n.11) contends that the issue was preserved as part of Question 1 in a footnote of the Petition (at 15 n.4), but permitting petitioner to shoehorn Question 2 into Question 1 in that fashion would violate two principles: issues raised only in footnotes are waived; and this Court will not review in the first instance an issue deemed forfeited and therefore not decided below.

Standing alone, any question regarding the enforceability of petitioner's non-exclusive trademark license post-rejection is moot. Tellingly, while petitioner filed a proof of claim for several million dollars in alleged damages from the loss of its exclusive distribution rights, pe-

titioner never asserted a damages claim for post-rejection deprivation of its non-exclusive trademark license. Nor is there any basis for a damage claim. The license expired in July 2016, and petitioner never attempted to sell products bearing respondent's trademark post-rejection. Petitioner has asserted it "would have" attempted to do so but for the lower court's orders, but the lower courts never enjoined petitioner from selling trademarked goods. Petitioner's decision to abide by the bankruptcy court's order affords no basis for a damages claim against the estate. Thus, there is no live controversy regarding the sole issue on which the Court granted review.

STATUTES INVOLVED

Sections 101(5), 101(35A), 365, 502(g)(1), 1113, and 1141(d)(1) of Title 11 of the United States Code, and Section 365(a) and (g)-(i) as enacted in 1978, are reproduced in a statutory addendum hereto, App., *infra*, 1a-26a.

STATEMENT

I. STATUTORY FRAMEWORK

A. Principles Of Rejection

1. Upon the filing of a bankruptcy petition, a bankruptcy estate is formed, comprising "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. 541. A bankruptcy trustee serves as the "representative of the estate." 11 U.S.C. 323. In a chapter 11 case like this one, the debtor serves as "debtor in possession," with all the powers of a trustee. 11 U.S.C. 1101(1), 1107(a).

The trustee has a period of time to decide whether to "assume or reject any executory contract or unexpired lease." 11 U.S.C. 365(a) and (d). Contracts that are assumed are assumed *"cum onere," i.e.*, with all benefits and burdens. *NLRB* v. *Bildisco & Bildisco*, 465 U.S. 513, 531-532 (1984). Upon assumption, a contract becomes enforceable against the estate, and "the expenses and liabilities incurred may be treated as administrative expenses, which are afforded the highest priority on the debtor's estate." *Ibid.*

In contrast, a rejected executory contract remains unenforceable. A contract that is not assumed "is not an enforceable contract" of the estate; "suit may not be brought against the debtor-in-possession under the * * * agreement; recovery may be had only through administration of the claim in bankruptcy." *Bildisco*, 465 U.S. at 530, 532. The trustee's power to reject is a unique authority granted by the Code, permitting the trustee to "deal with [the debtor's] contracts and property in a manner it could not have employed absent the bankruptcy filing." *Id.* at 528.

2. Rejection of an executory contract "constitutes a breach of such contract * * * immediately before the date of the filing of the petition," 11 U.S.C. 365(g)(1), giving rise to a dischargeable, pre-petition "claim" against the estate, 11 U.S.C. 502(g)(1). "Claim" includes any "right to payment" and any "right to an equitable remedy for breach of performance if such breach gives rise to a right to payment." 11 U.S.C. 101(5). Such rights are "claims," whether "reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unse-

cured." *Ibid.* All claims are administered in the bankruptcy case, following the Code's priority scheme. 11 U.S.C. 507.

3. The Code contains several exceptions that permit counterparties to certain categories of contracts to choose specific statutorily-enumerated remedies as an alternative to the default remedy of a pre-petition claim. In 1978, when the Code was enacted, the default rule applied "[e]xcept as provided in subsections (h)(2) and (i)(2)." 11 U.S.C. 365(g) (1976 Supp. III) (reproduced at App., *infra*, 24a-26a). At that time, Subsection (h) governed real property leases, and Subsection (i) governed real property sales contracts where the purchaser was in possession. Each subsection offered the non-debtor counterparty a choice upon rejection: treat the agreement "as terminated" or "remain in possession." 11 U.S.C. 365(h)(1) and (i)(1). If the counterparty chose to "remain in possession," the specified "[e]xcept[ions]" in Subsections (h)(2) or (i)(2) governed the counterparty's relationship with the debtor—for example, allowing the counterparty to offset damages caused by rejection against amounts it owed the debtor.

Congress has added four more statutory exceptions governing particular types of contracts and reorganized Subsection (h), without making conforming amendments to Section 365(g)'s "[e]xcept as provided" clause.

In 1984, Congress added a statutory exception for collective bargaining agreements in response to this Court's decision in *Bildisco*. Pub. L. No. 98-353, 98 Stat. 333. That exception, 11 U.S.C. 1113, requires a debtor to follow specific procedures before rejecting a collective bargaining agreement. After complying, however, the

debtor may still "terminate" the agreement, or any provision, by rejecting it. 11 U.S.C. 1113(c)-(d).

Congress has also revised Sections 365(h) and (i), adding two new exceptions and rearranging Subsection (h). Timeshare interest sale contracts are subject to current Section 365(h)(2), and current Section 365(h)(1)(C) provides that the exception for real property leases, when invoked for shopping center leases, permits the enforcement of restrictive covenants concerning "radius, location, use, exclusivity, or tenant mix or balance." Original Section 365(h)(2) is now Section 365(h)(1)(B).

Finally, in response to the Fourth Circuit's decision in *Lubrizol Enterprises, Inc.* v. *Richmond Metal Finishers, Inc.*, 756 F.2d 1043 (1985), cert. denied, 475 U.S. 1057 (1986), Congress added a sixth statutory exception in Section 365(n) for licenses of certain forms of intellectual property. "Intellectual property," as defined in Section 101(35A) and as applicable to Section 365(n), covers, *e.g.*, patents and copyrights, but not trademarks. The omission was intentional: "[T]he bill does not address the rejection of executory trademark, trade name or service mark licenses by debtor-licensors." S. Rep. No. 505, 100th Cong., 2d Sess. 5 (1988).

Apart from Section 1113, which provides a unique process, the post-1978 exceptions, like the original exceptions for real property leases and certain real property sales contracts, provide the non-debtor counterparty with a binary choice: treat the contract "as terminated" or opt for alternative rights and duties spelled out in the Code. See 11 U.S.C. 365(h)(1) (real property leases), (h)(2) (timeshare interests), (i) (sales of real property and timeshare interests), and (n) (intellectual

property licenses). For example, if the counterparty decides to retain its rights under a patent license, it can choose to retain those rights "as such rights existed immediately before the [bankruptcy] case commenced," for "the duration of [the] contract; and any period for which [the] contract may be extended by the licensee as of right," including the "right to enforce any exclusivity provision of such contract," but must waive administrative claims against the licensor and make "all royalty payments," without a right of setoff with respect to rejection damages. 11 U.S.C. 365(n).

B. Trademark Law

Trademark law is grounded in the law of unfair competition. *B & B Hardware, Inc.* v. *Hargis Indus., Inc.*, 135 S. Ct. 1293, 1299 (2015). In 1946, Congress enacted the Lanham Act, "to provide national protection for trademarks used in interstate and foreign commerce." *Park 'N Fly, Inc.* v. *Dollar Park & Fly, Inc.*, 469 U.S. 189, 193 (1985).

As public symbols of the source of goods or services, trademarks protect consumers by helping them "identify goods and services that they wish to purchase, as well as those they want to avoid." *Matal* v. *Tam*, 137 S. Ct. 1744, 1751 (2017). Trademarks "secure to the owner of the mark the goodwill of his business and * * * protect the ability of consumers to distinguish among competing producers." *Park 'N Fly*, 469 U.S. at 198 (citation omitted).

A defining feature of trademarks is unified ownership: "Good will and its trademark symbol are as inseparable" as conjoined twins who "cannot be separated

without death to both." 3 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 18:2 (5th ed. 2018) (McCarthy). The Lanham Act recognizes this principle, permitting assignment of a registered mark only "with the good will of the business in which the mark is used." 15 U.S.C. 1060(a)(1). It also indicates that goodwill from "legitimate[]" use of the mark "shall inure to the benefit of the [trademark] registrant." 15 U.S.C. 1055; 3 McCarthy § 18:45.50.

Although early trademark law held that licensing was "totally inconsistent" with unified ownership and would cause loss of rights in a mark, *e.g.*, *Macmahan Pharmacal Co.* v. *Denver Chem. Mfg. Co.*, 113 F. 468, 475 (8th Cir. 1901), licensing is now permitted so long as the licensor controls "the nature and quality of the goods or services" sold by the licensee, see 15 U.S.C. 1055, 1127. Trademark law thus imposes an affirmative duty of quality control on the owner-licensor. 3 McCarthy § 18:42. Licensing a trademark without adequate quality control is a "naked licens[e]" and renders the license invalid. *Dawn Donut Co.* v. *Hart's Food Stores, Inc.*, 267 F.2d 358, 367 (2d Cir. 1959).

Unlike other intellectual property, trademarks continue in perpetuity unless and until abandoned. See 15 U.S.C. 1058, 1059, 1127. Trademarks may evolve over time as the owner updates them as marketing strategies change. 3 McCarthy § 17:28 (showing examples). As a trademark evolves, quality-control covenants allow the licensor to police consistency of the trademark's use.

II. Background Of The Case

A. Respondent Tempnology, LLC designed patented, chemical-free cooling fabrics used to make towels, socks, and headbands that would stay cool during strenuous activity. Respondent marketed its products under the "Coolcore" and "Dr. Cool" brands and held a "significant intellectual property portfolio support[ing]" its products, including issued and pending patents and trademarks. Pet. App. 2a-3a.

On November 21, 2012, respondent entered into a Co-Marketing, Sourcing and Distribution Agreement (Agreement) with petitioner. J.A. 203-293. The Agreement contained three categories of rights relevant here: certain exclusive distribution rights, a non-exclusive intellectual property license (excluding trademarks), and a non-exclusive trademark license.

Distribution Rights: Respondent granted petitioner rights to sell respondent's products worldwide, except for certain countries in East Asia. J.A. 203-205 (§ 1(A), (B)). Within the United States, respondent granted petitioner "exclusive distribution rights" for some products (Exclusive Cooling Accessories). J.A. 203-205 (§ 1(A), (B)), 211-218 (§§ 5, 6), 256 (Ex. A). For other products, called "Non-Exclusive Cooling Accessories," respondent reserved to itself "the right to sell" to certain types of customers. J.A. 211 (§ 5).

Intellectual Property License, Excluding Trademarks: Respondent granted petitioner "a non-exclusive, irrevocable, royalty-free, fully paid-up, perpetual, worldwide, fully transferable license" to its products and intellectual property *except* for its trademarks. J.A. 234-235 (§ 15(b)).

Trademark License: In a separate provision, Section 15(d), respondent granted petitioner a "non-exclusive, non-transferable, limited license * * * to use its Coolcore trademark and logo (as well as any other Marks licensed hereunder) for the limited purpose of performing its obligations hereunder, exercising its rights and promoting the purposes of this Agreement." J.A. 237-238. Respondent prohibited use of its marks "in a (i) disparaging or inaccurate manner or (ii) manner which is inconsistent with the terms of this Agreement." *Ibid.* Section 15(d) provided that the trademark license "shall expire upon the termination of this Agreement except as necessary to allow either party to exercise its rights during the Wind-Down Period." *Ibid.*

Petitioner agreed to "comply with any written trademark guidelines" provided by respondent. J.A. 237-238. The parties also agreed to each other's "right to review and approve all uses of its Marks," except for pre-approved uses. *Ibid.* Other provisions provided for further quality-control oversight by respondent. J.A. 213-216 (§ 6(a), (b)), 222 223 (§ 9(a)), 227-229 (§ 11).

The Agreement further provided "[f]or avoidance of doubt" that each party's "use of the other party's Marks will not create in it * * * any right, title, or interest in or to such Marks other than the limited licenses expressly granted herein," and that "all use of the other party's Marks in connection with this Agreement will inure to the benefit, and be on behalf, of the other party." J.A. 237-238 (§ 15(d)).

The initial term of the Agreement ended on July 1, 2016, and automatically renewed for additional one-year periods, subject to mutual termination rights. J.A. 207

(§ 2). By written notice, each party could terminate the Agreement without cause, starting a two-year wind-down period. J.A. 207-209 (§ 3).

B. In 2014, the relationship between petitioner and respondent soured. On June 30, 2014, petitioner issued notice of termination without cause, triggering a wind-down period ending on July 1, 2016. Pet. App. 4a-5a. On July 22, 2014, respondent issued its own notice of termination, with cause, alleging material breach of the Agreement and declaring the Agreement terminated immediately. *Id.* at 4a. Per the Agreement, the parties entered into arbitration. *Id.* at 4a-5a.

During the arbitration, on April 16, 2015, petitioner notified respondent that it did "not presently contemplate making any purchases from [respondent] for the 2015-2016 Contract Year," *i.e.*, through July 1, 2016. J.A. 558-559. On June 10, 2015, the arbitrator issued a partial award in petitioner's favor, finding that the Agreement remained in effect. J.A. 294-311. This "ruling meant that [petitioner] was contractually entitled to retain its distribution and trademark rights until July 1, 2016," when the Agreement terminated. Pet. App. 5a.

C. Respondent's financial prospects, already poor in 2014, grew worse. J.A. 321. On September 1, 2015, respondent filed a chapter 11 bankruptcy petition. Pet. App. 5a. The following day, respondent moved to reject certain of its executory contracts pursuant to 11 U.S.C. 365. J.A. 28. Respondent also sought approval of bidding procedures to sell substantially all of its assets, including its trademarks. J.A. 28-29. Respondent's pre-

bankruptcy secured lender, Schleicher & Stebbins Hotels, L.L.C. (S&S), would serve as the stalking-horse bidder. J.A. 399.

Petitioner objected to both the rejection and sale motions. In a brief order issued October 2, 2015, the bankruptcy court granted respondent's motion to reject the Agreement as of the petition date, subject to petitioner's "election to preserve its rights under 11 U.S.C. § 365(n)." Pet. App. 83a-84a.

On October 8, 2015, the bankruptcy court set bidding procedures for the sale. J.A. 78-79. Petitioner and S&S participated, and S&S was declared the successful bidder on November 6, 2015. J.A. 412.

Respondent asked the court to determine the applicability and scope of petitioner's rights under Section 365(n). In its November 12, 2015 opinion, the bankruptcy court held that Section 365(n) protected petitioner's patent license but that petitioner was not entitled to retain its exclusive distribution rights or non-exclusive trademark license after rejection. Pet. App. 76a-81a. The court reasoned that the Agreement distinguished the exclusive distribution rights from the non-exclusive patent license and that the former did not "amount to anything more than the right to sell and distribute specified products." *Id.* at 79a. Further, the court held that Congress's omission of trademarks from Section 365(n) meant petitioner did not retain its trademark rights post-rejection. *Id.* at 80a-81a. Petitioner appealed.

On December 18, 2015, the bankruptcy court approved the sale of respondent's assets (including trademarks) to S&S, free and clear of petitioner's rights under

the Agreement. J.A. 443-541. The sale closed immediately afterwards. J.A. 542. The Bankruptcy Appellate Panel (BAP), 558 B.R. 500 (2016), and First Circuit, 879 F.3d 376 (2018), affirmed. The sale order is final.

On December 21, 2015, petitioner filed a proof of claim, claiming $4,160,000 for "intentional misconduct," "breach of exclusivity provisions," "failure to defend IP against competitors," and "damage to relationships," based on sales of respondent's products to other distributors. J.A 547-557.

The Agreement's wind-down period expired on July 1, 2016. During the wind-down period, petitioner made no purchases from respondent. J.A. 335-338, 593.

D. On November 18, 2016, the BAP affirmed in part and reversed in part the bankruptcy court's decision regarding the effect of rejection. Pet. App. 35a-65a. The BAP agreed that Section 365(n) did not protect petitioner's exclusive distribution rights from rejection. *Id.* at 49a-51a. The BAP explained that the "letter [and] spirit of the Agreement" confirmed that the exclusive distribution rights and the intellectual property license were separate provisions, serving "two independent goals." *Ibid.* However, relying on the Seventh Circuit's decision in *Sunbeam Products, Inc.* v. *Chicago American Manufacturing, LLC*, 686 F.3d 372, cert. denied, 568 U.S. 1076 (2012), the BAP held that petitioner retained the right to use respondent's trademarks after rejection. Pet. App. 51a-60a. The BAP adopted *Sunbeam's* rationale that "[w]hat section 365(g) does by classifying rejection as a breach is establish that in bankruptcy, as outside of it, the other party's rights remain in place." *Id.* at 59a-60a (quoting 686 F.3d at 377).

Petitioner appealed the BAP's ruling regarding exclusive distribution rights; respondent did not cross-appeal the trademark license ruling.

E. The court of appeals ordered briefing on whether the case was moot. J.A. 560-561. Petitioner argued that it was not but conceded that petitioner "does not believe that injunctive relief is required should it prevail" and is "only seek[ing] monetary relief." J.A. 573. Petitioner asserted that, if the court found that its exclusivity rights survived rejection, respondent's violations of the exclusivity provision "would give rise to a claim by [petitioner]." J.A. 570. Petitioner further stated that, but for the bankruptcy court's decision, it "would have continued" using respondent's trademarks post-rejection, "in furtherance of its exclusive rights." J.A. 572.

On January 12, 2018, the court of appeals affirmed the original bankruptcy court opinion in all respects, with one judge partially dissenting. Pet. App. 1a-34a. The court rejected petitioner's efforts to cast its exclusive distribution rights as intellectual property rights under Section 365(n), holding that "[a]n exclusive right to sell a product is not equivalent to an exclusive right to exploit the product's underlying intellectual property." *Id.* at 15a. Moreover, while petitioner had "salt[ed] its brief with several undeveloped suggestions that rejection under section 365(a)" might not extinguish its exclusive distribution rights, it had never raised the argument in the bankruptcy court and, therefore, "the argument is waived in this civil action." *Id.* at 19a-20a.

With respect to trademark rights, the court of appeals rejected *Sunbeam*'s approach, noting the continuing quality-control burden that approach would impose

on debtors. Pet. App. 23a-27a. The court reasoned that allowing petitioner to continue using respondent's marks would force respondent "to choose between performing executory obligations arising from the continuance of the license or risking the permanent loss of its trademarks." *Id.* at 24a. Such restrictions on respondent's ability to free itself from executory obligations would jeopardize its fresh start and "depart from the manner in which section 365(a) otherwise operates." *Ibid.* The court of appeals explained that rejection does not "vaporize" a right but "converts the right into a prepetition claim for damages." *Id.* at 22a. The court rejected the dissent's proposed "case-specific, equitable approach" as lacking any statutory foundation. *Id.* at 24a-27a.

F. Petitioner sought a writ of certiorari, presenting two questions: (1) whether, under Section 365, a debtor-licensor's "rejection" of a license agreement terminates rights of the licensee that would survive the licensor's breach under applicable nonbankruptcy law, and (2) whether an exclusive right to sell certain products practicing a patent in a particular geographic territory is a "right to intellectual property" within the meaning of Section 365(n). Pet. i.

On June 11, 2018, S&S asked the bankruptcy court to lift the stay to distribute the estate's remaining cash—$524,274.70—to S&S, in partial satisfaction of its secured claims. J.A. 179. Petitioner objected. On September 19, 2018, the bankruptcy court granted the lift-stay motion; it subsequently declined to enter a stay pending appeal, but it delayed the order's effectiveness so petitioner could seek a stay from the BAP. J.A. 596-597.

On October 26, 2018, this Court granted review solely as to Question 1. 139 S. Ct. 397.

On November 7, 2018, petitioner sought a stay pending appeal from the BAP, which denied the motion. Order, No. 18-48 (Nov. 27, 2018). Petitioner sought no further relief regarding the lift-stay order, and the estate's remaining funds were distributed to S&S on November 29, 2018. Debtor-in-Possession Monthly Operating Report, No. 15-11400-CJP (Bankr. D.N.H. Dec. 17, 2018), ECF No. 597.

SUMMARY OF ARGUMENT

The Court need not reach the merits of either of petitioner's claims. Petitioner's claim concerning exclusive distribution rights is outside the question presented, and its trademark license claim is moot because the Court cannot provide any meaningful relief. The case should therefore be dismissed.

If the Court reaches the merits, neither petitioner's trademark license nor its exclusive distribution rights survive the Agreement's rejection. The general rule in Section 365(a) and (g) of the Code provides the nondebtor counterparty to a rejected executory contract with a right to file a dischargeable pre-petition claim for damages as the sole remedy for rejection. Congress has provided exceptions for six specific categories of contracts; none applies here.

I. Petitioner's exclusive distribution rights are outside of the question presented. In Question 2 of the Petition, petitioner asked the Court to consider whether petitioner's exclusive distribution rights were an intellectual property license protected by Section 365(n).

The Court denied review of that question. The Court should reject Petitioner's attempts to rewrite the Agreement to shoehorn exclusive distribution rights into Question 1. Moreover, the court of appeals deemed this argument waived. Pet. App. 19a-20a. This Court should not consider it in the first instance.

Because petitioner's exclusive distribution rights claim is not within Question 1, the case is moot because the Court cannot grant any effectual relief on the only remaining claim. Petitioner's trademark license has expired, and petitioner never used the trademark between rejection and the license's expiration. Petitioner's purely speculative argument that it would have used the mark but for the bankruptcy court's rulings provides no damages claim against the estate and does not support jurisdiction.

II. If the Court reaches the merits, petitioner's arguments fail. The text, structure, and purpose of Section 365 and related provisions confirm that a rejected contract cannot be enforced against the estate, unless a statutory exception applies. Instead, the counterparty's exclusive remedy is a pre-petition claim for damages.

Section 365 creates a dichotomy. The trustee either assumes the contract, taking all of its benefits and burdens, or rejects it, rendering it "not an enforceable contract" against the estate. *NLRB* v. *Bildisco & Bildisco*, 465 U.S. 513, 532 (1984); 11 U.S.C. 365(a) and (g)(1), 502(g)(1). Rejection is a tool that "could not have [been] employed absent the bankruptcy filing." *Bildisco*, 465 U.S. at 528. Upon rejection, the Bankruptcy Code reduces all of the non-debtor's non-bankruptcy rights to a "claim" for monetary damages—defined intentionally to

be all-encompassing. 11 U.S.C. 101(5), 365(g)(1), 502(g)(1). Unless a statutory exception applies, the contract is otherwise unenforceable against the estate.

Congress's creation of express statutory exceptions confirms the general rule. Each exception provides the counterparty with a binary choice between (a) the background rule, *i.e.*, treating the contract as breached and pursuing a pre-petition damages claim, or (b) retaining certain statutorily defined rights and obligations. The exceptions reflect Congress's careful balance of the rights of the debtor and non-debtor. To interpret the general rule as allowing the non-debtor to retain other remedies would swallow the exceptions by providing greater rights under the general rule, violating both the *expressio unius* canon and rule against superfluities.

Petitioner's rule would frustrate the Code's goals of rehabilitating debtors and maximizing property available for creditors, and would upset the Code's policy of equality in distributing assets to creditors, by arbitrarily elevating the claim of certain counterparties to rejected contracts above other general unsecured creditors' claims.

III. Applying these principles, neither petitioner's non-exclusive trademark license nor its exclusive distribution right is enforceable against the estate following rejection. Petitioner's remedy for each is a pre-petition damages claim.

Petitioner erroneously claims a property interest in respondent's trademarks. A trademark license does not create a property interest in the trademark—just a contractual right to use it. Trademarks are unique: unlike patents or copyrights, trademarks by definition require

unified ownership of the mark and its goodwill, obliging the owner to exercise quality control over the goods and services sold under any license. The Agreement's text is in accord, stating that the non-exclusive trademark license conveyed a contract right, not a property interest. And because the trademark license required an ongoing bilateral relationship between the parties, including requiring respondent to continue specific obligations to maintain quality control of the marks, the license reflected much more than the purely "negative covenants" that petitioner (incorrectly) asserts would allow the contract to remain enforceable post-rejection.

This Court has already denied review of the only argument presented to and decided by the court of appeals concerning petitioner's exclusive distribution rights. But if the Court reaches those rights, petitioner's only remedy for their rejection is a pre-petition damages claim. As the court of appeals found, exclusive distribution rights are neither an interest in respondent's intellectual property nor other "property" that petitioner (incorrectly) asserts survives rejection.

ARGUMENT

I. REJECTION'S EFFECT ON PETITIONER'S EXCLUSIVE DISTRIBUTION RIGHTS IS NOT WITHIN THE QUESTION PRESENTED, AND ITS EFFECT ON PETITIONER'S EXPIRED TRADEMARK LICENSE IS A MOOT ISSUE

A. The Effect Of Rejection On Petitioner's Exclusive Distribution Rights Under The Agreement Is Outside The Question On Which The Court Granted Review

The Court granted certiorari "limited to Question 1," 139 S. Ct. 397 (2018), concerning the consequences under Section 365 of "'rejection' of a *license* agreement" for "rights of the *licensee*," Pet. i (emphases added). The Agreement expressly distinguishes between "license" rights to intellectual property, J.A. 232-240 (§ 15, "Intellectual Property"), and exclusive distribution rights, J.A. 211-218 (§§ 5-6, "Product Exclusivity" and "Distribution Exclusivity and Collaboration"). Only the former—"license" rights—are before the Court; petitioner's exclusive distribution rights were the subject of the Petition's second question, as to which the Court denied review.

In the courts below, petitioner argued that "its exclusivity rights under sections 1, 5, 6, and 7 of the Agreement" constituted "the grant of an exclusive license apart from the Non-Exclusive License under section 15(b)," supposedly bringing those rights within Section 365(n)'s exception for patent licenses. Pet. App. 75a; see also *id.* at 14a-15a, 50a-51a. The lower courts all rejected petitioner's "attempt to re-characterize its exclusive product distribution rights under the Agreement as an

intellectual property license." *Id.* at 51a; see also *id.* at 14a-15a, 79a. Construing the Agreement, the court of appeals held that "[t]he only thing that is exclusive is the right to sell certain products, not the right to practice, for example, the patent that is used to make those products." *Id.* at 15a; see also *id.* at 51a, 79a.

In Question 2, petitioner sought review of the court of appeals' holding that petitioner's exclusive distribution rights did not constitute an intellectual property license under Section 365(n), asking "[w]hether an exclusive right to sell certain products practicing a patent in a particular geographic territory is a 'right to intellectual property' within the meaning of § 365(n) of the Bankruptcy Code." Pet. i. Respondent observed that it was unnecessary to review the court of appeals' conclusion "that Petitioner's exclusive right to distribute certain products in a limited geographic territory did not rise to the level of a grant of a license in intellectual property that would enjoy post-rejection protection under section 365(n)." Br. in Opp. 17-18. The Court declined review on Question 2. 139 S. Ct. at 397.

Despite the Court's refusal to review the holding that petitioner's exclusive distribution rights are not a "license" (which petitioner (Br. 41) states it "does not challenge * * * here"), petitioner now contends that Question 1 encompasses "[petitioner's] exclusivity rights." Br. 41-42 & n.11. Nowhere, however, does petitioner explain how its "exclusivity rights" qualify as "rights of a licensee" under a "license agreement" within Question 1 if, as the lower courts held, those exclusive distribution rights are not a "license" under the Agreement's terms.

Furthermore, letting petitioner expand Question 1 would require this Court to decide in the first instance an issue the court of appeals declined to reach. That court held that "the argument [was] waived" because petitioner "never raised any such argument in the bankruptcy court as a basis for preserving its exclusive distribution rights." Pet. App. 20a. This is "a court of review, not of first view." *Nautilus, Inc.* v. *Biosig Instruments, Inc.*, 572 U.S. 898, 913 (2014) (internal quotation marks and citation omitted).

Ironically, petitioner urges that it resurrected this forfeited argument *in a footnote* in the Petition and that respondent "waived" any objection by not flagging petitioner's forfeiture in the Brief in Opposition. Pet. Br. 41-42 n.11 (citing Pet. 15 n.4). This Court's rule is to the contrary; a "footnote reference" is "plainly insufficient to raise the issue." *Communist Party of U.S.* v. *Subversive Activities Control Bd.*, 367 U.S. 1, 34-35 n.10 (1961). If respondent did not recognize petitioner's intent in footnote 4 to revive an issue the court of appeals deemed forfeited, that only proves the wisdom of the rule, not waiver. In any event, footnote 4 *nowhere suggests* petitioner intended to present for this Court's resolution under Question 1 whether its exclusive distribution rights survived rejection. Instead, petitioner stated that if the Court reversed regarding "the trademark issue," the court of appeals could decide on remand whether to relieve petitioner of its forfeiture and address "application of [this Court's] ruling to [petitioner's] exclusive distribution rights." Pet. 15 n.4. Tellingly, petitioner's amici do not address the merits of its exclusive distribution rights argument.

B. If The Court Agrees That Petitioner's Exclusive Distribution Rights Claim Is Not Within The Question Presented, The Case Is Moot

Standing alone, petitioner's trademark license claim is moot because petitioner has no legal or economic interest that depends on the case's outcome. "[A]n actual controversy must be extant at all stages of review * * *. If an intervening circumstance deprives the plaintiff of a personal stake in the outcome of the lawsuit, * * * the action can no longer proceed and must be dismissed as moot." *Genesis Healthcare Corp.* v. *Symczyk*, 569 U.S. 66, 71-72 (2013) (citations omitted).

A case is moot and should be dismissed when it becomes "impossible for the court to grant 'any effectual relief'" to the prevailing party. *Church of Scientology* v. *United States*, 506 U.S. 9, 12 (1992) (citation omitted). There is no ongoing dispute about enforceability of petitioner's non-exclusive trademark license, which has expired. Nor is there a live controversy concerning petitioner's trademark rights between rejection and the license's expiration, because petitioner never used the trademark during that period. Indeed, petitioner's only damages claim regarding the post-rejection period concerns its exclusive distribution rights, which are no longer at issue.

It is undisputed that petitioner's trademark license expired on July 1, 2016. Cert. Reply Br. 9. Thus, there is no ongoing dispute about future enforcement of petitioner's rights under the trademark license.

Nor, in light of the denial of certiorari regarding petitioner's exclusive distribution rights, is there any live controversy regarding damages relating to petitioner's

non-exclusive trademark license. Both before the court of appeals and at the petition stage before this Court, petitioner responded to respondent's suggestions of mootness (*e.g.*, Br. in Opp 1, 16; Letter from respondent's counsel to Clerk, at 1-2 (Oct. 23, 2018)) by pointing to its damages claim stemming from purported interference with its exclusive distribution rights. In the court of appeals, petitioner noted its suit in the Southern District of New York against S&S (purchaser of respondent's assets) for tortious interference with petitioner's purported exclusive distribution rights. J.A. 569. And in its petition-stage reply (at 9 (citing J.A. 584-585)), petitioner pointed to its multi-million dollar proof of claim for damages resulting from sales by petitioner's competitors. But a dispute regarding exclusive distribution rights, on which the Court denied review, cannot support jurisdiction over petitioner's now-expired, non-exclusive trademark license.

Nor is there any live dispute about damages for *post-rejection* interference with petitioner's non-exclusive trademark license. In its petition-stage reply (at 9), petitioner did not separately address pre- and post-rejection claims, discussing generally claims for interference with petitioner's use of the trademarks "during the two years before the agreement terminated," which included petitioner's assertion that respondent "wrongfully repudiat[ed] the agreement and demand[ed] that [petitioner] cease using its trademarks" in July 2014, long before the bankruptcy. Petitioner has *never* asserted that respondent interfered with petitioner's non-exclusive trademark license post-bankruptcy, apart from rejecting the Agreement. Indeed, before the court

of appeals, petitioner conceded that it never sold trademarked products post-rejection, only that petitioner "*would have*" done so "[b]ut for [the bankruptcy court's] decision finding that rejection terminated [petitioner's] trademark rights under the Agreement." J.A. 572 (emphasis added). But petitioner's choice to comply with the bankruptcy court's ruling—which contained no injunction—pending appeal provides no basis for a post-petition damages claim against the estate.

Tellingly, even now petitioner does not assert that, apart from rejecting the Agreement, respondent interfered with petitioner's purported trademark rights post-rejection. Rather, it frames the dispute in hypothetical, conditional terms: "*had* [respondent] tried to stop [petitioner] from [using the trademarks post-rejection], the Agreement *would have* been a full defense to that claim." Pet. Br. 39 (emphasis added). Article III does not confer jurisdiction over hypothetical disputes. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The hypothetical nature of the dispute explains why respondent did not appeal from the BAP's ruling that petitioner retained its trademark license post-rejection. Resolution of the issue has no practical significance to respondent.[1]

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[1] The United States' speculation (Br. 32) that success by petitioner on the moot trademark license issue could lead the court of appeals on remand to exercise its discretion to relieve petitioner of its forfeiture concerning petitioner's exclusivity rights is not sufficiently concrete to avoid mootness. See *Lujan*, 504 U.S. at 562 (chain of causation depending on discretion of independent actors too speculative to satisfy redressability prong of standing). On remand, the First Circuit will only reconsider matters outside the mandate "sparingly and only when * * * necessary to avoid extreme

Finally, any post-bankruptcy claim against petitioner's estate has become even more academic due to the recent distribution of the estate's assets. On November 29, 2018, after the BAP denied petitioner's request for a stay pending appeal, respondent distributed the remaining $524,274.70 in the estate to secured creditor S&S, leaving a zero balance. Debtor-in-Possession Monthly Operating Report at 3-4, 13, No. 15-11400-CJP (Bankr. D.N.H. Dec. 17, 2018), ECF No. 597. Petitioner previously argued that those funds "would be necessary to satisfy any claim * * * with respect to which [petitioner] has petitioned for a writ of certiorari." Order at 19, No. 18-48 (B.A.P. 1st Cir. Nov. 27, 2018).

The combination of the denial of certiorari on Question 2 and the lack of any effectual relief on petitioner's non-exclusive trademark rights means there is no case or controversy to support Article III jurisdiction. The case should be dismissed as moot.

II. A Rejected Contract Is Unenforceable Against The Debtor's Estate, And No Remedy Other Than A Pre-Petition Damages Claim Is Available, Unless An Express Exception Applies

If the Court reaches the merits, the text, structure, and purpose of Section 365 and other Code provisions all confirm that, unless the contract falls within an express

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injustice." *Kotler* v. *American Tobacco Co.*, 981 F.2d 7, 13 (1992) (citation omitted). Neither petitioner nor the United States explains why holding petitioner to its forfeiture would be an "extreme injustice." *Ibid.* (citation omitted).

statutory exception, the rejected contract is unenforceable against the estate, except by way of a pre-petition claim for breach-of-contract damages.

A. Under Section 365's Plain Text, Executory Contracts Are Unenforceable Against The Debtor's Estate Unless Assumed And, If Rejected, Give Rise Only To A Pre-Petition Damages Claim

1. *Once a bankruptcy petition is filed, an executory contract is unenforceable against the estate unless assumed*

Section 365 and related provisions make clear that a "rejected" contract is not enforceable against a debtor's estate. The statute gives the trustee a binary choice: either "assume" or "reject" an executory contract. 11 U.S.C. 365(a). By "assuming" the contract, the trustee affirms it as an obligation of the estate, and liabilities under the contract become "actual, necessary costs and expenses of preserving the estate," treated as "administrative" expenses and "afforded the highest priority on the debtor's estate." 11 U.S.C. 503(b)(1)(A); *NLRB* v. *Bildisco & Bildisco*, 465 U.S. 513, 532 (1984). When the trustee "elect[s] to assume the executory contract, * * * it assumes the contract *cum onere*," *i.e.*, in its entirety, with all its burdens and benefits. *Bildisco*, 465 U.S. at 531-532; see, *e.g.*, *Sharon Steel Corp.* v. *National Fuel Gas Distrib. Corp.*, 872 F.2d 36, 40 (3d Cir. 1989) (citing *Bildisco*). If expressly rejected or not assumed within the statutory deadlines, 11 U.S.C. 365(a) and (d)(1), the executory contract is "not an enforceable con-

tract" against the estate, *Bildisco*, 465 U.S. at 532, except as a pre-petition claim, 11 U.S.C. 365(g)(1), 502(g)(1).

The distinct statutory outcomes of rejection and assumption confirm this strict dichotomy. Rejection creates a claim for *pre-petition* breach, 11 U.S.C. 365(g)(1), whereas assumption causes expenses under the contract to become administrative costs of "the estate," 11 U.S.C. 503(b)(1)(A). In other words, if rejected, the contract never becomes enforceable as an administrative claim against the estate.

Section 365 states that the "contract" must be rejected or assumed, meaning the *entire* contract; apart from specified exceptions, there is no sub-category of provisions of a rejected contract that passes through and remains enforceable. Section 365(a) speaks of assuming or rejecting "any executory contract," and Section 365(g) provides that "the rejection of an executory contract * * * constitutes a breach of such contract." Neither provision contemplates pulling contracts apart. See *Bildisco*, 465 U.S. at 532; *e.g.*, *City of Covington* v. *Covington Landing L.P.*, 71 F.3d 1221, 1226 (6th Cir. 1995) ("Neither the debtor nor the bankruptcy court may excise material obligations owing to the non-debtor contracting party.").

Congress's choice of the term "rejection" shows that it intentionally created a unique power within bankruptcy, rather than adopting (and limiting the trustee's power to) an existing concept from non-bankruptcy law. Petitioner (Br. 18) thus misses the mark by comparing rejection and "anticipatory repudiation * * * outside bankruptcy." Indeed, this Court has recognized that the

trustee is "empowered by virtue of the Bankruptcy Code to deal with its contracts and property in a manner it could not have employed absent the bankruptcy filing." *Bildisco*, 465 U.S. at 528. Even Professor Andrew, on whose work petitioner relies so heavily, acknowledges that the term "rejection" was "a radical departure from normal contract law" with "no ready contract law analogue." Michael T. Andrew, *Executory Contracts In Bankruptcy: Understanding 'Rejection'*, 59 U. Colo. L. Rev. 845, 847-848 (1988). Moreover, Congress has received at least one proposal to amend Section 365 to eliminate the concept of "rejection" and replace it with a non-bankruptcy concept, "election to breach." See Nat'l Bankruptcy Review Commission Final Report, *Bankruptcy: The Next Twenty Years* 459-460 (Oct. 20, 1997) (proposal of congressionally created commission). The proposal would have adopted a rule similar to what petitioner espouses here. *Id.* at 459-462. Congress did not enact the proposal.

Accordingly, petitioner's assertion (Br. 14) that rejection "does not give the estate any greater rights than the breaching party * * * would have outside bankruptcy," cannot be squared with the text or this Court's recognition that rejection is a power the debtor "could not have employed absent the bankruptcy filing," *Bildisco*, 465 U.S. at 528.

2. *A non-debtor's sole remedy for a rejected contract is a pre-petition claim for damages*

Upon rejection, the Bankruptcy Code reduces all of a non-debtor counterparty's non-bankruptcy rights, including equitable remedies of specific performance, to a

monetary damages claim. The default rule is that "rejection of an executory contract * * * constitutes a breach of such contract * * * immediately before the date of the filing of the petition," 11 U.S.C. 365(g)(1), and all rights under non-bankruptcy law are replaced with a right to a dischargeable pre-petition claim against the estate, 11 U.S.C. 502(g)(1), unless a specific statutory exception applies to give the non-debtor counterparty alternative rights.

Critically, the Code provision defining "claim," 11 U.S.C. 101(5), is all-encompassing. It sweeps in any conceivable form of breach-of-contract damages, including any "right to payment" or "right to an equitable remedy for breach of performance," whether "unliquidated," "contingent," or "unmatured." *Ibid.* Section 101(5) is the "broadest possible definition" of "claim" because the Code "contemplates that all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case." S. Rep. No. 989, 95th Congress, 2d Sess. 21-22 (1978); *Ohio* v. *Kovacs*, 469 U.S. 274, 279 (1985) (citing same).

Section 101(5)'s breadth serves an important purpose. Before 1934, the Code's predecessors only discharged claims that "mature[d] at or before the filing of the petition." *City Bank Farmers Tr. Co.* v. *Irving Tr. Co.*, 299 U.S. 433, 440 (1937). This undercut the rehabilitative purpose of bankruptcy law. The counterparty's matured debts were discharged, but the original agreement remained effective, allowing the counterparty to "haunt the bankrupt" by "harass[ing] the discharged bankrupt by successive actions for accruing rent and so retard or prevent the debtor's financial rehabilitation which the statute was intended to aid." *Id.* at 437-438.

Bankruptcy Act amendments in 1934 solved the problem, making the debtor's future obligations "of whatsoever sort" provable claims in bankruptcy." *Id.* at 437-439. Section 101(5)'s broad definition of "claim" and other Code provisions confirm that even difficult-to-calculate future damages from rejection must be asserted as pre-petition claims and discharged. *E.g.*, 11 U.S.C. 502(c)(2) (authorizing estimate of "any right to payment arising from a right to an equitable remedy for breach of performance"), 1141(d)(1).

Petitioner's argument against mootness depends on its ability (which respondent contests) to enforce a rejected contract against the estate through a post-petition, administrative damages claim. See J.A. 563-564. The Code does not support that theory. Sections 365(g)(1) and 502(g)(1) specify that the remedy for rejection is a *pre-petition* claim, and Section 101(5) confirms that a "claim" encompasses "unmatured" claims under the contract. Petitioner offers no clearly articulated test for determining which "claims" for future losses under rejected contracts must be asserted as pre-petition claims entitled only to pro rata distributions under Sections 365(g)(1), 502(g)(1), and 101(5), and which claims may instead be withheld and asserted as post-petition, priority administrative claims. To the extent petitioner contends that the counterparty can choose to sue for pre-petition breach or retain its contract rights and an option to sue for post-petition breach, Congress specified that such a choice is only available under certain statutory exceptions. 11 U.S.C. 365(g); see pp. 33-41, *infra*. Even in those exceptions, Congress expressly limited non-debtors' ability to assert administrative claims. See 11 U.S.C. 365(h)(1)(B) (limiting claim to a setoff right

against rent due), and (n)(2)(c) (requiring waiver of administrative claims and setoff rights).

Tellingly, petitioner did assert a $4.16 million proof of claim for pre-petition breach based on, *inter alia*, the expected value of its lost exclusive distribution rights under the Agreement. J.A. 555-557. That proof of claim confirms that petitioner's lost contract rights can be reduced to a "right to payment." Petitioner argues, however, that those claims may instead be asserted as post-petition administrative claims. J.A. 563-564. Without any test rooted in the statutory text, petitioner's theory would invite endless, costly litigation over whether a counterparty's contract rights survive rejection and are entitled to administrative priority. Indeed, petitioner's rule even raises the prospect of double recoveries. See Pet. Br. 33 (implying that counterparty would have a pre-petition claim for breach of contract and a right to assert a post-petition, administrative claim for subsequent non-performance).

B. Congress's Adoption Of Statutory Exceptions Allowing Enforcement Of Limited Rights In Certain Circumstances Confirms That, Outside Those Exceptions, Rejection Renders The Contract Entirely Unenforceable

1. *Express statutory exceptions allow contracting parties to elect particular statutory remedies instead of the general rule*

Congress has adopted specific exceptions to the general rule that rejection gives rise to a pre-petition damages claim as the exclusive remedy. When adopted in 1978, Section 365(g) made clear that it establishes the

general rule "[e]xcept as provided in subsections (h)(2) and (i)(2)." 11 U.S.C. 365(g) (1976, Supp. III). Those exceptions identified categories of contracts under which a counterparty could retain limited contract rights notwithstanding rejection. No such exception has ever existed for trademark licenses (or exclusive product distribution agreements). It is not the courts' role to adopt exceptions beyond those Congress established.

As originally enacted, Section 365(h)(1) gave nondebtor lessees to rejected real estate leases two options: (1) treat the lease as terminated and assert a damages claim, *i.e.*, the default rule, or (2) "remain in possession" of the property, subject to statutorily prescribed rights and obligations in Section 365(h)(2). 11 U.S.C. 365(h)(1) (1976 Supp. III). For example, a lessee who retained possession could "offset against the rent" damages from the lessor's nonperformance but would have to forego further claims against the estate. 11 U.S.C. 365(h)(2) (1976 Supp. III). Original Section 365(i)(1) and (2) provided a similar choice for certain purchasers of real property. 11 U.S.C. 365(i) (1976 Supp. III). By labeling only Subsections (h)(*2*) and (i)(*2*) as "[e]xcept[ions]" to (g), Congress made clear that "treat[ing] such contract[/lease] as terminated" under (h)(*1*) or (i)(*1*) was *not* an exception, but meant the same thing as the default rule under Section 365(g).[2]

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[2] Subsections (h)(1) and (i)(1) were also exceptions, to the extent they gave the counterparty (rather than trustee) the choice to accept termination or retain possession under the conditions of (h)(2) and (i)(2), but Congress understandably only identified as an "[e]xcept[ion]" the set of limited rights and duties if the counterparty elected possession. Doing so made clear that if the counter-

Later-enacted exceptions in Section 365 provide the counterparty with the same binary choice—accept rejection as termination under the general rule, or retain a limited set of statutory rights.[3] For example, when Congress added Subsection (n), it allowed licensees under rejected intellectual property licenses the binary choice to "treat such contract as terminated," or "retain its rights," subject to specified conditions. 11 U.S.C. 365(n)(1)-(3). Those "rights" reflect a careful balance between debtors and non-debtors, including limiting retained rights to those in existence on the petition date, requiring that royalty payments continue, and waiving any administrative claim or setoff rights. *Ibid.*

2. *Legislative amendments confirm that rejection forecloses the counterparty's ability to enforce the contract, except as a pre-petition claim*

Congress's responses to this Court's decision in *Bildisco* and the Fourth Circuit's in *Lubrizol Enterprises, Inc.* v. *Richmond Metal Finishers, Inc.*, 756 F.2d 1043 (1985), cert. denied, 475 U.S. 1057 (1986), confirm the interpretation of Subsections (a) and (g) that those decisions adopted. In each case, Congress did not re-

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party elected termination, the consequences would be those of Sections 365(g) and 502(g)(1)—a pre-petition damages claim, not some other remedy.

[3] Congress has not made conforming amendments to the "[e]xcept as provided" clause in Subsection (g) in light of subsequent amendments, including the restructuring of Subsection (h). See, *e.g.*, Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106, § 205(a).

spond by revising Subsection (g), but by creating an *additional, narrowly tailored exception* to Subsection (g)'s general rule.

In both cases, the courts construed Subsections (a) and (g) as providing that a rejected contract is "not an enforceable contract." *Bildisco*, 465 U.S. at 532; see *Lubrizol*, 756 F.2d at 1048. Each court based its construction of Subsections (a) and (g)'s effect in part on the enactment of statutory exceptions to the normal scope of those subsections. See *Bildisco*, 465 U.S. at 522 & n.8.; *Lubrizol*, 756 F.2d at 1048.

In each instance, Congress responded *not* by amending the general rule of subsections (a) and (g), but by adding *an additional exception to that general rule*. In 1984, Congress enacted a new exception, establishing that a trustee "may assume or reject a collective bargaining agreement only in accordance with the provisions of this section," which require making a proposal to the employee representative and presentation to the court to determine whether "the balance of the equities clearly favors rejection." 11 U.S.C. 1113(a), (b), and (c). Tellingly, however, a trustee *may* "terminate * * * provisions" of the agreement after complying with the prerequisites for rejection. See 11 U.S.C. 1113(d)(2) and (f). By confirming that rejection has the effect of "terminat[ing]" the agreement, Congress affirmed this Court's core holding in *Bildisco*.

Congress responded similarly to *Lubrizol*. Rather than amend Subsections (a) or (g), Congress adopted a new exception, providing licensees under a rejected intellectual property license a choice to "treat such contract as terminated" and pursue a pre-petition damages

claim, or "retain its rights" in the license subject to limitations. 11 U.S.C. 365(n)(1) and (2). The Senate Report confirms Congress's understanding that Subsection (n) creates a binary choice to "elect one of two sets of consequences to attach to that rejection," either "treat the rejection as terminating the license" or "elect to retain its rights under the license," subject to statutory conditions. S. Rep. No. 505, 100th Cong., 2d Sess. 8 (1988). The report further confirms that the former choice (treating the license as terminated) is the same as "would be available to the licensee without" the amendment. *Ibid.* At the same time, Congress consciously chose not to include trademark licenses in the new exception, noting that trademark licenses "raise issues beyond the scope of this legislation" because trademarks "depend to a large extent on control of the quality of the products or services sold by the licensee." *Id.* at 5.

Each amendment confirms the core holdings of *Bildisco* and *Lubrizol*—under the general rule, rejection makes the agreement "not an enforceable contract," *Bildisco*, 465 U.S. at 532, *i.e.*, rejection "terminates" the counterparty's ability to enforce any provision of the contract except by a pre-petition damages claim. Exclusive product distribution agreements and trademark licenses are not within any exception and thus are subject to the general rule.

3. *Where Congress adopts a specific list of exceptions, courts cannot add to the list, or construe the general rule to render the exceptions superfluous*

Under the *expressio unius* canon, Congress's adoption of specific exceptions where rights under rejected

contracts can be retained precludes courts from creating further exceptions. Relatedly, the rule against superfluities prevents reading the general rule so broadly that the exceptions become superfluous. Petitioner's reading violates both canons.

The *expressio unius* canon confirms that courts should not read Section 365 to create additional exceptions beyond those Congress adopted. "Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *Andrus* v. *Glover Constr. Co.*, 446 U.S. 608, 616-617 (1980); see also *Leatherman* v. *Tarrant Cty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993). Here, Congress's identification of certain carefully balanced exceptions to the general rule means that it did not intend for courts to create other exceptions. Petitioner's argument would permit an infinite number of exceptions, allowing counterparties to retain rights under many categories of rejected contracts not identified by Congress.

Petitioner's assertion that it retains rights under its rejected trademark license is a particularly egregious violation of the *expressio unius* canon. As discussed *supra*, Congress specifically considered creating an exception allowing retention of trademark license rights in Section 365(n) but declined to do so, in part because trademarks "depend to a large extent on control * * * of the products or services sold by the licensee." S. Rep. No. 505, at 5. And in 2013, the House of Representatives approved a bill to amend Section 101(35A) to include trademarks, service marks, and trade names in the definition of "intellectual property." H.R. 3309, 113th Cong.

§ 6(d)(2)(A)(iii). Notably, the House recognized that doing so required a further amendment to Section 365(n) to provide that "in the case of a trademark, service mark, or trade name, the trustee shall not be relieved of a contractual obligation to monitor and control the quality of a licensed product or service." *Ibid.* The bill also required licensees that retained rights to make "other payments," such as for trademark-based advertising. *Ibid.* The Senate, however, did not adopt the bill. Congress could enact a nuanced exception addressing the unique characteristics of trademarks, such as the need for continued monitoring; this Court cannot.

Similarly, the rule against superfluities requires that effect be given to each clause of a statute so that none is rendered superfluous. *Hibbs* v. *Winn*, 542 U.S. 88, 101 (2004). For similar reasons, exceptions must provide *greater* rights than the general rule, to avoid "the superfluity of a specific provision that is swallowed by the general [rule]." *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 566 U.S. 639, 645 (2012). Notably, the remedies provided by Section 365's exceptions, under petitioner's construction, are *narrower* than remedies available under non-bankruptcy law. For example, under petitioner's construction, trademark licensees under a rejected contract would retain the non-bankruptcy rights to set off post-rejection damages against royalties and other payments due to a debtor-licensor, and to utilize future versions of a trademark. However, neither setoff rights nor rights to use future versions of intellectual property are available to patent and copyright licensees under Section 365(n). Retained rights are limited "as such rights existed immediately before the [bank-

ruptcy] case commenced." 11 U.S.C. 365(n)(1)(B). Patent licensees must "make all royalty payments" and forego setoff rights. 11 U.S.C. 365(n)(2)(B) and (C). Given that under petitioner's view the "background rule" of Section 365 is more favorable to licensees than the Section 365(n) exception, it is unclear why a patent licensee would *ever* choose the statutory "exception."

Petitioner seeks to avoid these canons by urging that Subsections (h), (i), and (n) are "expressions of the general principle * * * , *rather than exceptions*," *i.e.*, they are "safe harbor[s]" showing particularized application of Section 365(g)'s general rule to "specific concern[s]." Pet. Br. 28 n.8, 47 (emphasis added). The first, and sufficient, response is that petitioner's view is directly contradicted by Congress's express designation of original Subsections (h)(2) and (i)(2) as "[e]xcept[ions]" to the general rule of Subsection (g). 11 U.S.C. 365(g). Alternatively, petitioner makes the counterintuitive argument (Br. 48) that Subsection (n) is not superfluous because it "provid[es] additional benefits *to debtors*" beyond the general rule. (Emphasis added). But it is nonsensical to think that Congress would permit the *counterparty* to choose a regime that affords *debtors* additional benefits beyond the background rule: the counterparty would always opt for the broader rights available under petitioner's version of the general rule.

Notably, *RadLAX*, which petitioner cites to support its view that Section 365's exceptions are instead "safe harbor[s]," Pet. Br. 47, *rejected* that proposed interpretation of the statute in question, finding it would be a "surpassingly strange manner" of carrying out Congress's intent. 566 U.S. at 647. So too here. Section 365(a) and (g) are better understood as setting forth a

broadly applicable general rule, except as provided in specific statutory exceptions.

C. Recognizing That Rejection Precludes A Contract's Enforcement Against The Estate As An Administrative Claim Furthers The Code's Purposes

Core purposes of bankruptcy law confirm that rejection of executory contracts yields just one remedy—a pre-petition damages claim. There are "two recognized policies underlying Chapter 11": "preserving going concerns and maximizing property available to satisfy creditors." *Bank of Am. Nat'l Tr. & Sav. Ass'n* v. *203 N. LaSalle St. P'ship*, 526 U.S. 434, 453 (1999). The Court has likewise recognized that "the authority to reject an executory contract is vital to the basic purpose of a Chapter 11 reorganization, because rejection can release the debtor's estate from burdensome obligations that can impede a successful reorganization." *Bildisco*, 465 U.S. at 528. Petitioner's dramatic curtailing of the trustee's power to reject burdensome contracts would frustrate those policies.

Even before the Code's adoption, the Court recognized that "[a] salient element" of "a reorganization is *the discharge of all demands of whatsoever sort*, executory and contingent, presently due or to mature in the future." *City Bank Farmers*, 299 U.S. at 438-439 (emphasis added). Congress underscored that purpose by adopting the "broadest possible definition" of "claim" in 11 U.S.C. 101(5) because the Code "contemplates that all legal obligations of the debtor, no matter how remote or

contingent, will be able to be dealt with in the bankruptcy case." S. Rep. No. 989, at 21-22; *Kovacs*, 469 U.S. at 279 (citing same).

Sections 365(g)(1) and 502(g)(1) further that same policy by establishing that all future damages, including "claims arising after filing" that "result from the rejection of an executory contract" must be "presented through the normal administration process by which claims are estimated and classified" and ultimately discharged. *Bildisco*, 465 U.S. at 530. Complete relief from burdensome contracts is especially important in Chapter 11 business reorganizations "to prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources." *Id.* at 528. Reorganizations often require new investment, which "could be jeopardized if the debtor-in-possession were saddled automatically with the debtor's prior" contractual undertakings. *Ibid.* An unsustainable contract granting unfavorable exclusive distribution rights and a trademark license to an antagonistic counterparty would jeopardize efforts to attract new capital for reorganization no less than an unfavorable collective bargaining agreement. And, as discussed below, see pp. 58-60, *infra*, a franchisor's successful reorganization may depend upon updating or repositioning its trademark, which would be frustrated if the franchisor was bound to prior franchise agreements.

"Equality of distribution among creditors" is another "central policy of the Bankruptcy Code" that petitioner's proposal would frustrate. *Begier* v. *IRS*, 496 U.S. 53, 58 (1990). "[C]reditors of equal priority should receive pro rata shares of the debtor's property." *Ibid.* Congress has established a hierarchy for creditors. It

respects the rights of secured creditors and priority classes of claims and treats contract rejection claims equally with other pre-petition claims, with specific exceptions for, *inter alia*, real property leases and intellectual property licenses. The Code treats unsecured creditors Congress has not separately addressed equally.

Petitioner's proposed rule would frustrate the policy of equal distribution by creating arbitrary distinctions between contract counterparties, depending on whether the counterparty can characterize its post-petition enforcement of a rejected contract as outside Sections 365(g)(1) and 502(g)(1). This case illustrates the arguments counterparties would make, attempting to characterize even a burdensome obligation to sell products exclusively through the counterparty as a "property right" surviving rejection. There is no reason a licensee's interest should be afforded priority over unsecured creditors who may have invested considerable sums in the licensor's business.

To be sure, a trustee's right to reject executory contracts is not absolute; it is subject to the bankruptcy court's approval. 11 U.S.C. 365(a). Where rejection is unnecessary "to the success of the reorganization," and would impose undue hardship on the counterparty without counterbalancing advantage to the estate, the "Bankruptcy Court [as] a court of equity" must "balanc[e] the equities" in deciding whether to approve rejection. *Bildisco*, 465 U.S. at 527; see, *e.g.*, *In re Petur U.S.A. Instrument Co.*, 35 B.R. 561, 563-564 (Bankr. W.D. Wash. 1983) (declining to approve rejection that would "result[] in the destruction" of the counterparty and cause damages "grossly disproportionate to any

benefit derived by the general creditors"). No such issue is presented here.[4]

D. Petitioner's Counter-Arguments Fail

1. *Petitioner's "property interest" theory is unsupported*

Underpinning much of petitioner's argument is the flawed contention that the Agreement "transfer[red] * * * an interest in property," *i.e.*, a property interest in respondent's patents and trademarks. Br. 22-23, 43. Petitioner asserts that rejection of the Agreement could not deprive petitioner of those "property" rights. Petitioner is mistaken.

(a) First, petitioner's argument proves too much. Rights under any contract constitute a "property interest." But to say that a contract is property is not the same as transferring title or even creating a contingent interest, such as a security interest, in an underlying asset. Any contract rejection that renders a pre-bankruptcy contract "not an enforceable contract," *Bildisco*, 465 U.S. at 532, deprives the counterparty of some "property," broadly defined. Simply denominating a contract right a "property" interest does not exempt that right from the consequences of Section 365(g).

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[4] The bankruptcy court's statutorily assigned role in approving assumption or rejection, 11 U.S.C. 365(a), which may involve equitable considerations, see *Bildisco*, 465 U.S. at 527, is distinct from the atextual, case-by-case "equitable" determination of which contract rights should survive rejection, as some judges and amici propose. See pp. 50-51, *infra*.

(b) Petitioner's argument regarding its contractual right to be exclusive distributor of respondent's products proves the breadth of its "interest-in-property" rule. Petitioner simply asserts (Br. 43) that the exclusive distribution contract provisions constituted "certain sticks in the bundle of sticks that comprised [respondent's] ownership of its intellectual property—the right to sell certain patented and trademarked products and to exclude others, including [respondent], from doing so in the United States." But petitioner's characterization of its contractual distribution rights as "certain sticks" of respondent's property is pure *ipse dixit*. Petitioner attempts to paint a narrow rule about "intellectual property," but its rule is broad and ill-defined. As the court of appeals correctly observed, the contractual exclusive-distribution term "is simply a restriction on the right to sell certain products that, like many products, happen to be made using a patent." Pet. App. 15a. If petitioner's exclusive contractual right to distribute respondent's products is a "property interest" in respondent's business, then *all* exclusive distribution rights must likewise survive.

(c) Nor does the "interest-in-property" theory help petitioner regarding its trademark license rights. As discussed further below, trademarks require unity of ownership and related goodwill, and they impose an ongoing obligation to police quality, which is a *sine qua non* of a valid license. See 15 U.S.C. 1055, 1127; 3 McCarthy §§ 18:2, 18:42; see also pp. 52-56, *infra*. Indeed, in excluding trademarks from the Section 365(n) exception, the Senate Report noted: "trademark * * * licensing relationships depend to a large extent on control of the quality of the products or services sold by the licensee."

S. Rep. No. 505, at 5. Moreover, consistent with the background legal rule, the Agreement makes explicit that it conveyed no property interest in respondent's trademarks. J.A. 238; pp. 54-56, *infra*. Petitioner's trademark license is just a right under a rejected contract. Petitioner does not own and has never owned any property interest in respondent's trademarks.

(d) Finally, petitioner's heavy reliance (Br. 24-29, 37) on this Court's 1924 decision in *Board of Trade of Chicago* v. *Johnson*, 264 U.S. 1, is misplaced. To begin, *Board of Trade* was not decided under the Bankruptcy Code. Nor did it address "rejection" of executory contracts. Thus, it has limited, if any, relevance to construing 11 U.S.C. 365(a) and (g), which were adopted over fifty years later.

To the extent the case is relevant to interpreting Section 365, it would be by analogy to *assumption* of a contract. The Court repeatedly relied on analysis of the Board of Trade's "rules"—*i.e.*, the relevant contract terms. 264 U.S. at 6, 7, 10, 12, 14. The estate sought to assume the member's benefits under that agreement without also assuming its burdens, which the Court ruled was impermissible. *Id.* at 14-15. Of course, the same is true of Section 365(a), which requires assuming the debtor's contracts "*cum onere*." *Bildisco*, 465 U.S. at 531-532. But the principle that under Section 365 a contract must be assumed or rejected *in toto* supports respondent, not petitioner. See pp. 28-30, *supra*.

Attempting to analogize to Section 365(a) and (g), petitioner seems to suggest that the Court considered "membership" as property separate from the Board's rules, which purportedly were the "rejected" contract,

and that the rules established a "property interest" in the membership that survived rejection. But this just demonstrates how far petitioner strains to shoehorn a 1924 decision into a 1978 statutory framework. The Code specifically addresses various contracts involving rights to a debtor's property, but it does so in specified exceptions. 11 U.S.C. 365(h), (i), and (n); 11 U.S.C. 1113.

Finally, to the extent *Board of Trade* retains relevance, it is unlike this case because it concerned a "lien" that was "inherent in the property in its creation," and because the party asserting the lien was the same party that created the "membership" property. 264 U.S. at 15. No similar relationship exists here. Petitioner's sole relationship to respondent's trademarks is the Agreement, which is an executory contract, subject to rejection under Section 365.[5]

2. *The proffered distinction between "negative covenants" and "affirmative obligations" also fails*

Petitioner's suggestion (Br. 34-35) of a difference between "negative" and "affirmative" obligations has no statutory support. Affirmative contractual obligations can almost always be recast as negative covenants, and vice versa. For example, a collective bargaining agreement, such as the one deemed unenforceable in *Bildisco*,

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[5] Nor does this case involve tangible property in which another party has a possessory interest, such as those addressed by the United States. *E.g.*, U.S. Br. 15 (analogies involving cars, photocopiers, and apartments). A separate provision of the Code, 11 U.S.C. 542, addresses the obligations of parties who are in possession of estate property, but that is beyond the scope of the present dispute.

can easily be reframed as a negative covenant—a promise not to hire anyone *other* than union members or not to provide pay and benefits *other* than those contractually agreed upon. Likewise, an exclusive distribution agreement can be characterized as an obligation *to* sell through the counterparty, or a duty to *refrain* from selling through others.

Congress has recognized that negative covenants in a rejected contract are not enforceable absent a statutory exception. To protect shopping center tenants, Congress enacted Section 365(h)(1)(C) to make enforceable negative covenants in leases "pertaining to radius, location, use, exclusivity, or tenant mix or balance," notwithstanding lease rejection by a debtor-landlord. That exception would be unnecessary if negative covenants remained enforceable post-rejection, as petitioner posits.

The purported distinction between negative covenants and affirmative obligations is not an administrable line. The only proper line is the one that Congress drew in specific exceptions from the general rule of Section 365(a) and (g).

3. *The repeated references of petitioner and its amici to "avoidance," "revocation," and "rescission" are red herrings*

By repeatedly trying to equate the court of appeals' ruling with the trustee avoiding, revoking, rescinding, or "vaporizing" the contract, petitioner (Br. 22-29, 55-56) and amici (*e.g.*, U.S. Br. 19-21) attack a straw argument. Neither the court of appeals nor respondent contends that rejection treats a contract as never having existed.

Instead, the counterparty's contractual rights are replaced with a claim for "breach of the contract which relates back to the date immediately preceding the filing of [the] petition in bankruptcy." *Bildisco*, 465 U.S. at 530.

The rejection power and the Code's process for allowance of claims are separate and distinct from the power to avoid a transfer under Sections 544 through 553. Avoidance unwinds a contractual obligation or transfer of interest in property, essentially treating that obligation or transfer as void and restoring the debtor to the *status quo ante*. See generally *Merit Mgmt. Grp., LP* v. *FTI Consulting, Inc.*, 138 S. Ct. 883, 888-889 (2018); 5 *Collier on Bankruptcy* § 548.10[1] (Alan N. Resnick & Henry J. Sommer, eds., 16th ed. 2018). By contrast, rejection does not unwind a contract; it limits remedies for rejection to a pre-petition claim for breach-of-contract damages. 11 U.S.C. 365(a) and (g); 11 U.S.C. 502(g)(1). The two powers have distinct purposes. Rejection releases a debtor from burdensome contractual obligations, giving counterparties breach-of-contract claims, *Bildisco*, 465 U.S. at 528, while avoidance helps "recapture the value of * * * avoided transfers for the benefit of the estate," *Merit Mgmt.*, 138 S. Ct. at 888 (citation omitted).

For the same reason, petitioner (Br. 35) and its amici (*e.g.*, U.S. Br. 13) err in suggesting that the court of appeals endorsed a power to "revoke" the Agreement, which they appear to equate with avoidance. Suggesting that respondent rendered the Agreement a nullity is incorrect for the reasons stated above, including because the counterparty retains a pre-petition damages claim based on the contract.

4. *The Code does not authorize an "equitable" case-by-case approach*

In his dissent, Judge Torruella suggested that courts reject a "bright-line rule" and instead adopt an "equitable" case-by-case approach to determine the effect of rejection on trademark licenses. Pet. App. 29a-34a. This approach, also endorsed by some amici, IPO Amicus Br. 24-30, AIPLA Amicus Br. 19-28, directly contradicts the Code and this Court's precedent.

This Court has "long held that whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code." *Law* v. *Siegel*, 571 U.S. 415, 421 (2014) (internal quotation marks and citation omitted). "Bankruptcy courts are not authorized in the name of equity to make wholesale substitution of underlying law controlling the validity of creditors' entitlements, but are limited to what the Bankruptcy Code itself provides." *Raleigh* v. *Illinois Dep't of Revenue*, 530 U.S. 15, 24-25 (2000). And bankruptcy courts have the "obligation to interpret the Code clearly and predictably using well established principles of statutory construction." *RadLAX*, 566 U.S. at 649.

Section 365 governs, exhaustively, the treatment of executory contracts. There is no statutory authorization for bankruptcy courts to conduct equitable analysis of the consequence of rejection under Subsection (g), as other provisions contemplate. *E.g.*, 11 U.S.C. 552(b) (permitting exception "based on the equities of the case"). It is no surprise that no court has found the Senate Report's ambiguous comment referencing "the development of equitable treatment * * * by bankruptcy

courts," S. Rep. No. 505, at 5, to be "a toehold for unfettered 'equitable' dispensations from section 365(a) rejection." Pet. App. 21a.

5. *There is no consensus supporting* Sunbeam

The majority of courts to consider *Lubrizol*'s application to trademarks have held that, in the absence of a statutory exception, trademark licenses are not enforceable after rejection. See Pet. App. 20a-27a; *In re HQ Global Holdings, Inc.*, 290 B.R. 507, 513 (Bankr. D. Del. 2003); *In re Dynamic Tooling Sys. Inc.*, 349 B.R. 847, 856 (Bankr. D. Kan. 2006); *In re Old Carco LLC*, 406 B.R. 180, 211 (Bankr. S.D.N.Y. 2009); *In re Centura Software Corp.*, 281 B.R. 660, 668-674 (Bankr. N.D. Cal. 2002); *In re Blackstone Potato Chip Co.*, 109 B.R. 557, 560-561 (Bankr. D.R.I. 1990); *In re Chipwich, Inc.*, 54 B.R. 427, 431 (Bankr. S.D.N.Y. 1985). *Sunbeam* disagreed, but it did not consider the unique characteristics of trademarks, Congress' expansive definition of "claim" in 11 U.S.C. 101(5), or the implications of the *expressio unius* canon. 686 F.3d at 375-378.

Nor is there an academic consensus supporting petitioner. Of the twenty-five articles amici law professors cite (Br. 13 n.8) as evidencing an "academic consensus" in favor of *Sunbeam*, twelve do not address trademark licensing at all. See, *e.g.*, Bradley S. Friedman, *Taking the Intellectual Out of Intellectual Property Licenses Under Section 365 of the Bankruptcy Code*, 20 J. Bankr. L. & Prac. 823, 825, 828-832 (2011) (expressly omitting "discussion of * * * trademark law"). Six that do address trademark licenses either agree with respondent, see,

e.g., Peter S. Menell, *Bankruptcy Treatment of Intellectual Property Assets: An Economic Analysis*, 22 Berkeley Tech L.J. 733, 775 (2007) (rejection leaves trademark licensee "with only a claim for breach of contract"), or call for a legislative solution, see, *e.g.*, Tyler S. Dischinger, *Problems in the Code, Section 305(a): A Call for Clarity*, 32 Am. Bankr. Inst. J. 50, 51 (2013).

III. Neither Petitioner's Non-Exclusive Trademark License Nor Its Exclusive Distribution Rights Under The Rejected Agreement Is Enforceable As An Administrative Claim

Applying the principles above, neither petitioner's non-exclusive trademark license nor its exclusive distribution rights is enforceable against the estate following rejection or could conceivably give rise to an administrative claim.

A. Petitioner's Trademark License Under The Rejected Agreement Is Not Enforceable As An Administrative Claim Against The Estate

1. *Background legal principles and the Agreement's terms make clear petitioner has no property interest in the mark*

Petitioner's assertion of a property interest in respondent's trademarks depends upon faulty analogies to other types of property that fail to account for a trademark's unique legal characteristics. As the leading treatise observes, "the 'property' parameters of a trademark are defined very differently from any other kind of 'property.'" 1 McCarthy § 2:10. It therefore warns against drawing "[a]nalogies to other forms of 'property,' from real estate to patents and copyrights."

Ibid. This Court has likewise observed that it is a "fundamental error" to "suppos[e] that a trade-mark right is a right in gross or at large, like a statutory copyright or a patent for an invention," because "[t]here is no such thing as property in a trade-mark except as a right appurtenant to an established business or trade in connection with which the mark is employed." *United Drug Co.* v. *Theodore Rectanus Co.*, 248 U.S. 90, 97 (1918); see *Visa, U.S.A., Inc.* v. *Birmingham Tr. Nat'l Bank*, 696 F.2d 1371, 1375 (Fed. Cir. 1982) ("Unlike patents or copyrights, trademarks are not separate property rights * * * [from] the goodwill of the business or services to which they pertain.").

The Lanham Act requires that a trademark and accompanying goodwill must always be held by a single owner, creating the inseverable tie of unified ownership. See 15 U.S.C. 1060(a)(1) (permitting trademark assignment only "with the good will of the business in which the mark is used"); 3 McCarthy § 18:2; see also, *e.g.*, *Visa*, 696 F.2d at 1375. The rule of unified ownership serves the long-recognized purposes of trademark law. If property interests in a trademark could be allocated to multiple owners, there would be no guarantee of consistent quality, and the trademark would no longer be synonymous with the goodwill of the company's goods or services, harming both the mark's owner and the public. See 1 McCarthy § 2:15; 3 McCarthy § 18:48.

Unified ownership imposes a fundamental restriction on trademark licensing: a trademark owner may license a trademark "*only* if the [owner] exercises control over the nature and quality of the goods and/or services sold by the licensee under the licensed mark." 3 McCarthy § 18:38 (emphasis added); see *Dawn Donut Co.* v. *Hart's*

Food Stores, Inc., 267 F.2d 358, 367 (2d Cir. 1959). The owner must exercise quality control even absent an explicit quality-control provision in the license "because trademark law, rather than the contract itself, confers on the licensor the right and obligation to exercise quality control." *Miller* v. *Glenn Miller Prods.*, 454 F.3d 975, 992 (9th Cir. 2006). The quality-control requirement ensures that all goodwill arising from use of the trademark "inure[s] to the benefit of" the licensor, as federal law requires. 15 U.S.C. 1055. "[T]he grant of [a] license[] without the retention of control" is a "naked licens[e]" and is "invalid." *Dawn Donut*, 267 F.2d at 367.

The consequence of these unique features of trademarks is that a "licensee acquires no ownership rights in the mark itself." 3 McCarthy § 18:52. Rather than confer a property interest in the trademark, a trademark license "confers *only the right to use* the trademark." *Silverstar Enters., Inc.* v. *Aday*, 537 F. Supp. 236, 239 (S.D.N.Y. 1982) (emphasis added) (citation omitted).

Moreover, as petitioner concedes (Br. 6), its trademark license was expressly designated "*non-exclusive*." (Emphasis added); see J.A. 237. As this Court has recognized, "[t]he hallmark of a protected property interest is the right to exclude others." *College Sav. Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 673 (1999). This rule applies to trademarks as well; a trademark owner has a property right "because he can exclude others from using them." *Ibid.* By designating petitioner's license "non-exclusive," the parties invoked a term with an "established legal meaning": "that the licensee is granted *a bare right to use* the trademark or patent

being licensed *without any right to exclude others.*" *Hugo Boss Fashions, Inc.* v. *Federal Ins. Co.*, 252 F.3d 608, 617 (2d Cir. 2001) (internal citation and quotation marks omitted, emphasis altered). As the court of appeals correctly observed regarding the Agreement, "[t]he only thing that is exclusive is the right to sell certain products, not the right to practice, for example, the patent that is used to make those products." Pet. App. 15a.[6]

In addition to these background principles, the Agreement itself confirms that the trademark license was merely a nonexclusive contract right, not a conveyance of a property interest. The Agreement states that "[i]t is not the parties' intention to create any jointly owned Intellectual Property Rights hereunder. Rather, the parties intend that all Intellectual Property Rights should be categorized as either [Petitioner's] Property or [Respondent's] Property and licensed pursuant to the terms herein." J.A. 239. With respect to respondent's trademarks in particular, the Agreement provides: "For avoidance of doubt, each party acknowledges that its use of the other party's Marks will not create * * * any right, title, or interest in or to such Marks other than the limited licenses expressly granted herein." J.A. 238.

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[6] Petitioner's reliance (Br. 37) on *K Mart Corp.* v. *Cartier, Inc.*, 485 U.S. 176 (1988), is misplaced. While *K Mart* does reference that trademark owners possess a "bundle" of rights, including "the right to enlist the Customs Service's aid to bar [importation of] foreign-made goods bearing [a registered] trademark," 485 U.S. at 186, it says nothing about whether a trademark owner can assign "sticks" within the bundle that would destroy the unified ownership that is fundamental to trademark law.

Trademark licensees are not left without methods to protect themselves from risk of a licensor's bankruptcy. See James M. Wilton & Andrew G. Devore, *Trademark Licensing in the Shadow of Bankruptcy*, 68 Bus. Lawyer 739, 776-780 (May 2013). They could insist that the trademark be owned and controlled by a separate entity shielded against bankruptcy risk. *Id.* at 778-779; Richard M. Cieri & Michelle M. Morgan, *Licensing Intellectual Property and Technology from the Financially-Troubled or Startup Company: Prebankruptcy Strategies to Minimize the Risk in a Licensee's Intellectual Property and Technology Investment*, 55 Bus. Lawyer 1649, 1687-1690 (2000). Or they could insist on a security agreement, giving the licensee a secured claim and priority if the license agreement is rejected. Wilton & Devore at 779-780; Cieri & Morgan at 1691-1692; 11 U.S.C. 506. In other words, trademark licensees, similar to other pre-petition creditors, can negotiate for contract rights that minimize credit risk, discourage rejection, or afford priority in the event of bankruptcy.

2. *Petitioner's trademark license under the Agreement was not merely a "negative covenant"*

Even if the Court were to adopt petitioner's proposal (Br. 35) that "*negative* covenants" in an executory contract survive rejection and remain enforceable against the estate, the Agreement's trademark license was not a mere "negative covenant." Rather, consistent with background trademark law, the Agreement contemplated an ongoing bilateral relationship and required respondent to maintain quality control of the marks.

As is typical of trademark licenses, the Agreement required close coordination between respondent and petitioner regarding use of respondent's trademarks. Petitioner was required to follow respondent's trademark guidelines, and respondent could review and approve petitioner's uses of respondent's trademarks. The parties were to agree on the exact placement, size, and treatment of Coolcore branding on products. J.A. 227-229 (§ 11). Further, the parties agreed "to work together on determining the appropriate branding for cooling accessories manufactured at [petitioner's] factory." *Ibid.* The parties also agreed "to finalize the structure, commission, plan, and process associated with [petitioner's] representation of [Coolcore]-branded apparel products" in certain sales channels. J.A. 213-214 (§ 6(a)). Respondent agreed to give petitioner at least 120 days' advance notice and obtain prior written approval for "any proposed changes in Cooling Accessories or other products that would materially alter the nature, quality, durability, size, composition, style, performance, functionality, or character of such products." J.A. 222-223 (§ 9(a)). Thus, the Agreement's quality-control provisions require a close and collaborative relationship between respondent and petitioner to develop the brand and to market products, with the goodwill accruing solely to respondent. J.A. 237-238 (§ 15(d)).

Petitioner and some amici attempt to downplay the crucial role of quality control in maintaining the integrity of trademarks in the marketplace, arguing that quality control is a legal requirement separate from the trademark license. The issue is not the precise source of these requirements, but that the unified ownership unique to trademarks means there is no license without

quality control and that a license without quality control risks abandonment of the mark. See 3 McCarthy § 18:42; 15 U.S.C. 1127; see, *e.g.*, *Dawn Donut*, 267 F.2d at 367.

Consistent with the background principles of trademark law, the Agreement's trademark license imposes substantial quality-control burdens and bears little likeness to patent licenses. This is precisely why Congress omitted trademarks from Section 365(n).

3. *Petitioner's rule would severely damage trademark owners' ability to reorganize*

The *Sunbeam* rule petitioner advocates would severely frustrate the ability of trademark owners to reorganize in bankruptcy and, in many cases, would make reorganization impossible. For many trademark owners, a successful reorganization or going-concern sale will depend on using the tools the Code affords debtors, including the power to reject burdensome licenses under Section 365(a) to maximize the value of their trademarks. Failure to reorganize would result in piecemeal liquidation at significantly reduced values, harming creditors, employees, and customers.

There are numerous examples of trademark owners whose attempts at reorganization ended in failure and liquidation due, in part, to their inability under *Sunbeam* to terminate pre-petition trademark licenses following rejection. See, *e.g.*, Mem. L. Supp. Mot. TRO at 24, *In re Aerogroup Int'l, Inc.*, No. 17-51889-KJC (Bankr. D. Del. Dec. 22, 2017), ECF No. 7; Order at 1, 17-11962-KJC, *In re Aerogroup Int'l, Inc.* (Bankr. D. Del. Feb. 21, 2018), ECF No. 671.

Petitioner's rule is particularly fraught with peril for hotel and restaurant franchisors. Franchise agreements require intensive and rigorous enforcement of detailed contractual quality-control covenants addressing issues ranging from national or regional advertising, approved vendors, maintenance and upkeep, and requirements for standardized menus and services. To reorganize, a restaurant or hotel franchisor may need to modernize or revitalize its brand. See Bonnie M. Rubin, *They Were Huge Franchises. Why Did They Collapse?*, Wall St. J. (Nov. 25, 2018) (describing "rebranding" of three distressed restaurant brands, including the Ground Round trademark acquired from a Chapter 11 bankruptcy case); see also Wilton & Devore at 773 n.210. Reorganization may require rejection of franchise agreements with onerous contract terms or agreements with substandard or litigious licensees. See, *e.g.*, *Gorenstein Enters., Inc.* v. *Quality Care-USA, Inc.*, 874 F.2d 431, 435-436 (7th Cir. 1989) (Posner, J.) (noting protracted litigation where franchisees "were holding the trademark hostage as a bargaining tactic to pressure [the franchisor] into renegotiating the franchise or settling the suit"). If the *Sunbeam* rule applies and licensees can continue to use licensed brands under the failed franchise business plans that yielded bankruptcy, reorganization will often be impossible. And as the court of appeals correctly observed, the *Sunbeam* rule would force licensors to choose between (1) retaining burdensome obligations associated with monitoring quality control and continuing relationships with adversarial franchisees, or (2) abandoning a valuable trademark to the public domain. Pet. App. 24a. Either choice would impede a franchisor's ability to reorganize or maximize

creditor recoveries through a going-concern sale in bankruptcy, undermining a fundamental purpose of the Code.

B. Petitioner's Exclusive Distribution Rights Under The Rejected Agreement Are Not Enforceable As An Administrative Claim Against The Estate

As discussed at pp. 21-23, *supra*, the Court denied review on the only question that was presented and decided by the court of appeals concerning petitioner's exclusive distribution rights under the Agreement. Should the Court nonetheless reach the issue, it should affirm.

Even if a counterparty's "property" rights survive rejection, but see pp. 44-47, *supra*, petitioner's exclusive distribution rights under the Agreement are not an interest in respondent's property. Despite petitioner's attempt (Br. 43) to cast them as such, by calling them "sticks in the bundle of sticks that comprised [respondent's] ownership of its intellectual property," the reality is that the exclusive distribution rights under the Agreement were "simply a restriction on [respondent's] right to sell certain products that, like many products, happen to be made using a patent." Pet. App. 15a. Petitioner and respondent could have made the same contractual agreement regarding sales of identified products within specified territories "even if there were no patent license at all." *Ibid.*; see J.A. 211-218 (Agreement §§ 5-6). Petitioner's argument about its contractual exclusive distribution rights thus has nothing to do with the existence of a "license" but extends to any exclusive distribution agreement. Petitioner had a contractual right but no interest in respondent's property.

Nor, for reasons explained above, are petitioner's exclusive distribution rights outside the scope of Section 365 merely because petitioner can characterize respondent's obligation as a "negative covenant." Barring respondent from selling its products to any person other than petitioner would put a stranglehold on respondent's future business even more than would holding the estate in *NLRB* v. *Bildisco & Bildisco* to its collective bargaining agreement. 465 U.S. 513, 526-527 (1984). Notably, even when Congress revised the Code after *Bildisco* to provide additional procedural protections to employees under such agreements, it recognized that the estate retained the right (subject to those procedures) ultimately to "terminate" the agreement. 11 U.S.C. 1113(d)(2).

Petitioner's argument contravenes this Court's precedent and the very purpose of bankruptcy law. Petitioner repeatedly (Br. 42, 43, 44) invokes the result "outside bankruptcy" if respondent sought to breach exclusive distribution provisions. That is irrelevant. Respondent is in bankruptcy and "empowered by virtue of the Bankruptcy Code to deal with its contracts and property in a manner it could not have employed absent the bankruptcy filing." *Bildisco*, 465 U.S. at 528. Whereas the power to reject a contract in bankruptcy renders the contract "not an enforceable contract" of the estate except as a pre-petition claim, *id.* at 532, petitioner's rule would allow petitioner to enforce the contract as an administrative claim, with priority over other creditors. That contravenes Congress's express intent. Congress gave "claim" extraordinary breadth to ensure that "all demands of whatever sort, * * * presently due or to mature in the future," are asserted as *pre*-petition claims and discharged. *City Bank Farmers Tr. Co.* v. *Irving*

Tr. Co., 299 U.S. 433, 437-439 (1937). This ensures that the counterparty cannot "haunt the bankrupt" after rejection, by "harass[ing] the discharged bankrupt by successive actions" to prevent the debtor's successful reorganization. *Ibid.* Petitioner's contrary rule must be rejected.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX

1. 11 U.S.C. 101 provides in pertinent part:

Definitions

In this title the following definitions shall apply:

* * * * *

(5) The term "claim" means—

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

* * * * *

(35A) The term "intellectual property" means—

(A) trade secret;

(B) invention, process, design, or plant protected under title 35;

(C) patent application;

(D) plant variety;

(E) work of authorship protected under title 17; or

(F) mask work protected under chapter 9 of title 17; to the extent protected by applicable nonbankruptcy law.

* * * * *

2. 11 U.S.C. 365 provides:

Executory contracts and unexpired leases

(a) Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.

(b)(1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee—

> (A) cures, or provides adequate assurance that the trustee will promptly cure, such default other than a default that is a breach of a provision relating to the satisfaction of any provision (other than a penalty rate or penalty provision) relating to a default arising from any failure to perform nonmonetary obligations under an unexpired lease of real property, if it is impossible for the trustee to cure such default by performing nonmonetary acts at and after the time of assumption, except that if such default arises from a failure to operate in accordance with a nonresidential real property lease, then such default shall be cured by performance at and after the time of assumption in accordance with such lease, and pecuniary losses resulting from such default shall be compensated in accordance with the provisions of this paragraph;
>
> (B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for

any actual pecuniary loss to such party resulting from such default; and

(C) provides adequate assurance of future performance under such contract or lease.

(2) Paragraph (1) of this subsection does not apply to a default that is a breach of a provision relating to—

(A) the insolvency or financial condition of the debtor at any time before the closing of the case;

(B) the commencement of a case under this title;

(C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement; or

(D) the satisfaction of any penalty rate or penalty provision relating to a default arising from any failure by the debtor to perform nonmonetary obligations under the executory contract or unexpired lease.

(3) For the purposes of paragraph (1) of this subsection and paragraph (2)(B) of subsection (f), adequate assurance of future performance of a lease of real property in a shopping center includes adequate assurance—

(A) of the source of rent and other consideration due under such lease, and in the case of an assignment, that the financial condition and operating performance of the proposed assignee and its guarantors, if any, shall be similar to the financial condition and operating performance of the debtor and its guarantors, if any, as of the time the debtor became the lessee under the lease;

(B) that any percentage rent due under such lease will not decline substantially;

(C) that assumption or assignment of such lease is subject to all the provisions thereof, including (but not limited to) provisions such as a radius, location, use, or exclusivity provision, and will not breach any such provision contained in any other lease, financing agreement, or master agreement relating to such shopping center; and

(D) that assumption or assignment of such lease will not disrupt any tenant mix or balance in such shopping center.

(4) Notwithstanding any other provision of this section, if there has been a default in an unexpired lease of the debtor, other than a default of a kind specified in paragraph (2) of this subsection, the trustee may not require a lessor to provide services or supplies incidental to such lease before assumption of such lease unless the lessor is compensated under the terms of such lease for any services and supplies provided under such lease before assumption of such lease.

(c) The trustee may not assume or assign any executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if—

(1)(A) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and

(B) such party does not consent to such assumption or assignment; or

(2) such contract is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor, or to issue a security of the debtor; or

(3) such lease is of nonresidential real property and has been terminated under applicable nonbankruptcy law prior to the order for relief.

(d)(1) In a case under chapter 7 of this title, if the trustee does not assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor within 60 days after the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such contract or lease is deemed rejected.

(2) In a case under chapter 9, 11, 12, or 13 of this title, the trustee may assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor at any time before the confirmation of a plan but the court, on the request of any party to such contract or lease, may order the trustee to determine within a specified period of time whether to assume or reject such contract or lease.

(3) The trustee shall timely perform all the obligations of the debtor, except those specified in section 365(b)(2), arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected, notwithstanding section 503(b)(1) of this title. The court may extend, for cause, the time for performance of any such obligation that arises within 60 days after the

date of the order for relief, but the time for performance shall not be extended beyond such 60-day period. This subsection shall not be deemed to affect the trustee's obligations under the provisions of subsection (b) or (f) of this section. Acceptance of any such performance does not constitute waiver or relinquishment of the lessor's rights under such lease or under this title.

(4)(A) Subject to subparagraph (B), an unexpired lease of nonresidential real property under which the debtor is the lessee shall be deemed rejected, and the trustee shall immediately surrender that nonresidential real property to the lessor, if the trustee does not assume or reject the unexpired lease by the earlier of—

(i) the date that is 120 days after the date of the order for relief; or

(ii) the date of the entry of an order confirming a plan.

(B)(i) The court may extend the period determined under subparagraph (A), prior to the expiration of the 120-day period, for 90 days on the motion of the trustee or lessor for cause.

(ii) If the court grants an extension under clause (i), the court may grant a subsequent extension only upon prior written consent of the lessor in each instance.

(5) The trustee shall timely perform all of the obligations of the debtor, except those specified in section 365(b)(2), first arising from or after 60 days after the order for relief in a case under chapter 11 of this title under an unexpired lease of personal property (other

than personal property leased to an individual primarily for personal, family, or household purposes), until such lease is assumed or rejected notwithstanding section 503(b)(1) of this title, unless the court, after notice and a hearing and based on the equities of the case, orders otherwise with respect to the obligations or timely performance thereof. This subsection shall not be deemed to affect the trustee's obligations under the provisions of subsection (b) or (f). Acceptance of any such performance does not constitute waiver or relinquishment of the lessor's rights under such lease or under this title.

(e)(1) Notwithstanding a provision in an executory contract or unexpired lease, or in applicable law, an executory contract or unexpired lease of the debtor may not be terminated or modified, and any right or obligation under such contract or lease may not be terminated or modified, at any time after the commencement of the case solely because of a provision in such contract or lease that is conditioned on—

(A) the insolvency or financial condition of the debtor at any time before the closing of the case;

(B) the commencement of a case under this title; or

(C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement.

(2) Paragraph (1) of this subsection does not apply to an executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if—

(A)(i) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to the trustee or to an assignee of such contract or lease, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and

(ii) such party does not consent to such assumption or assignment; or

(B) such contract is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor, or to issue a security of the debtor.

(f)(1) Except as provided in subsections (b) and (c) of this section, notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law, that prohibits, restricts, or conditions the assignment of such contract or lease, the trustee may assign such contract or lease under paragraph (2) of this subsection.

(2) The trustee may assign an executory contract or unexpired lease of the debtor only if—

(A) the trustee assumes such contract or lease in accordance with the provisions of this section; and

(B) adequate assurance of future performance by the assignee of such contract or lease is provided, whether or not there has been a default in such contract or lease.

(3) Notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law that terminates or modifies, or permits a party

other than the debtor to terminate or modify, such contract or lease or a right or obligation under such contract or lease on account of an assignment of such contract or lease, such contract, lease, right, or obligation may not be terminated or modified under such provision because of the assumption or assignment of such contract or lease by the trustee.

(g) Except as provided in subsections (h)(2) and (i)(2) of this section, the rejection of an executory contract or unexpired lease of the debtor constitutes a breach of such contract or lease—

(1) if such contract or lease has not been assumed under this section or under a plan confirmed under chapter 9, 11, 12, or 13 of this title, immediately before the date of the filing of the petition; or

(2) if such contract or lease has been assumed under this section or under a plan confirmed under chapter 9, 11, 12, or 13 of this title—

(A) if before such rejection the case has not been converted under section 1112, 1208, or 1307 of this title, at the time of such rejection; or

(B) if before such rejection the case has been converted under section 1112, 1208, or 1307 of this title—

(i) immediately before the date of such conversion, if such contract or lease was assumed before such conversion; or

(ii) at the time of such rejection, if such contract or lease was assumed after such conversion.

(h)(1)(A) If the trustee rejects an unexpired lease of real property under which the debtor is the lessor and—

(i) if the rejection by the trustee amounts to such a breach as would entitle the lessee to treat such lease as terminated by virtue of its terms, applicable nonbankruptcy law, or any agreement made by the lessee, then the lessee under such lease may treat such lease as terminated by the rejection; or

(ii) if the term of such lease has commenced, the lessee may retain its rights under such lease (including rights such as those relating to the amount and timing of payment of rent and other amounts payable by the lessee and any right of use, possession, quiet enjoyment, subletting, assignment, or hypothecation) that are in or appurtenant to the real property for the balance of the term of such lease and for any renewal or extension of such rights to the extent that such rights are enforceable under applicable nonbankruptcy law.

(B) If the lessee retains its rights under subparagraph (A)(ii), the lessee may offset against the rent reserved under such lease for the balance of the term after the date of the rejection of such lease and for the term of any renewal or extension of such lease, the value of any damage caused by the nonperformance after the date of such rejection, of any obligation of the debtor under such lease, but the lessee shall not have any other right against the estate or the debtor on account of any damage occurring after such date caused by such nonperformance.

(C) The rejection of a lease of real property in a shopping center with respect to which the lessee

elects to retain its rights under subparagraph (A)(ii) does not affect the enforceability under applicable nonbankruptcy law of any provision in the lease pertaining to radius, location, use, exclusivity, or tenant mix or balance.

(D) In this paragraph, "lessee" includes any successor, assign, or mortgagee permitted under the terms of such lease.

(2)(A) If the trustee rejects a timeshare interest under a timeshare plan under which the debtor is the timeshare interest seller and—

(i) if the rejection amounts to such a breach as would entitle the timeshare interest purchaser to treat the timeshare plan as terminated under its terms, applicable nonbankruptcy law, or any agreement made by timeshare interest purchaser, the timeshare interest purchaser under the timeshare plan may treat the timeshare plan as terminated by such rejection; or

(ii) if the term of such timeshare interest has commenced, then the timeshare interest purchaser may retain its rights in such timeshare interest for the balance of such term and for any term of renewal or extension of such timeshare interest to the extent that such rights are enforceable under applicable nonbankruptcy law.

(B) If the timeshare interest purchaser retains its rights under subparagraph (A), such timeshare interest purchaser may offset against the moneys due for such timeshare interest for the balance of the term after the date of the rejection of such

timeshare interest, and the term of any renewal or extension of such timeshare interest, the value of any damage caused by the nonperformance after the date of such rejection, of any obligation of the debtor under such timeshare plan, but the timeshare interest purchaser shall not have any right against the estate or the debtor on account of any damage occurring after such date caused by such nonperformance.

(i)(1) If the trustee rejects an executory contract of the debtor for the sale of real property or for the sale of a timeshare interest under a timeshare plan, under which the purchaser is in possession, such purchaser may treat such contract as terminated, or, in the alternative, may remain in possession of such real property or timeshare interest.

(2) If such purchaser remains in possession—

(A) such purchaser shall continue to make all payments due under such contract, but may, offset against such payments any damages occurring after the date of the rejection of such contract caused by the nonperformance of any obligation of the debtor after such date, but such purchaser does not have any rights against the estate on account of any damages arising after such date from such rejection, other than such offset; and

(B) the trustee shall deliver title to such purchaser in accordance with the provisions of such contract, but is relieved of all other obligations to perform under such contract.

(j) A purchaser that treats an executory contract as terminated under subsection (i) of this section, or a party

whose executory contract to purchase real property from the debtor is rejected and under which such party is not in possession, has a lien on the interest of the debtor in such property for the recovery of any portion of the purchase price that such purchaser or party has paid.

(k) Assignment by the trustee to an entity of a contract or lease assumed under this section relieves the trustee and the estate from any liability for any breach of such contract or lease occurring after such assignment.

(*l*) If an unexpired lease under which the debtor is the lessee is assigned pursuant to this section, the lessor of the property may require a deposit or other security for the performance of the debtor's obligations under the lease substantially the same as would have been required by the landlord upon the initial leasing to a similar tenant.

(m) For purposes of this section 365 and sections 541(b)(2) and 362(b)(10), leases of real property shall include any rental agreement to use real property.

(n)(1) If the trustee rejects an executory contract under which the debtor is a licensor of a right to intellectual property, the licensee under such contract may elect—

> (A) to treat such contract as terminated by such rejection if such rejection by the trustee amounts to such a breach as would entitle the licensee to treat such contract as terminated by virtue of its own terms, applicable nonbankruptcy law, or an agreement made by the licensee with another entity; or
>
> (B) to retain its rights (including a right to enforce any exclusivity provision of such contract, but ex-

cluding any other right under applicable nonbankruptcy law to specific performance of such contract) under such contract and under any agreement supplementary to such contract, to such intellectual property (including any embodiment of such intellectual property to the extent protected by applicable nonbankruptcy law), as such rights existed immediately before the case commenced, for—

(i) the duration of such contract; and

(ii) any period for which such contract may be extended by the licensee as of right under applicable nonbankruptcy law.

(2) If the licensee elects to retain its rights, as described in paragraph (1)(B) of this subsection, under such contract—

(A) the trustee shall allow the licensee to exercise such rights;

(B) the licensee shall make all royalty payments due under such contract for the duration of such contract and for any period described in paragraph (1)(B) of this subsection for which the licensee extends such contract; and

(C) the licensee shall be deemed to waive—

(i) any right of setoff it may have with respect to such contract under this title or applicable nonbankruptcy law; and

(ii) any claim allowable under section 503(b) of this title arising from the performance of such contract.

(3) If the licensee elects to retain its rights, as described in paragraph (1)(B) of this subsection, then on the written request of the licensee the trustee shall—

(A) to the extent provided in such contract, or any agreement supplementary to such contract, provide to the licensee any intellectual property (including such embodiment) held by the trustee; and

(B) not interfere with the rights of the licensee as provided in such contract, or any agreement supplementary to such contract, to such intellectual property (including such embodiment) including any right to obtain such intellectual property (or such embodiment) from another entity.

(4) Unless and until the trustee rejects such contract, on the written request of the licensee the trustee shall—

(A) to the extent provided in such contract or any agreement supplementary to such contract—

(i) perform such contract; or

(ii) provide to the licensee such intellectual property (including any embodiment of such intellectual property to the extent protected by applicable nonbankruptcy law) held by the trustee; and

(B) not interfere with the rights of the licensee as provided in such contract, or any agreement supplementary to such contract, to such intellectual property (including such embodiment), including any right to obtain such intellectual property (or such embodiment) from another entity.

(*o*) In a case under chapter 11 of this title, the trustee shall be deemed to have assumed (consistent with the debtor's other obligations under section 507), and shall immediately cure any deficit under, any commitment by the debtor to a Federal depository institutions regulatory agency (or predecessor to such agency) to maintain the capital of an insured depository institution, and any claim for a subsequent breach of the obligations thereunder shall be entitled to priority under section 507. This subsection shall not extend any commitment that would otherwise be terminated by any act of such an agency.

(p)(1) If a lease of personal property is rejected or not timely assumed by the trustee under subsection (d), the leased property is no longer property of the estate and the stay under section 362(a) is automatically terminated.

(2)(A) If the debtor in a case under chapter 7 is an individual, the debtor may notify the creditor in writing that the debtor desires to assume the lease. Upon being so notified, the creditor may, at its option, notify the debtor that it is willing to have the lease assumed by the debtor and may condition such assumption on cure of any outstanding default on terms set by the contract.

(B) If, not later than 30 days after notice is provided under subparagraph (A), the debtor notifies the lessor in writing that the lease is assumed, the liability under the lease will be assumed by the debtor and not by the estate.

(C) The stay under section 362 and the injunction under section 524(a)(2) shall not be violated by notification of the debtor and negotiation of cure under this subsection.

(3) In a case under chapter 11 in which the debtor is an individual and in a case under chapter 13, if the debtor is the lessee with respect to personal property and the lease is not assumed in the plan confirmed by the court, the lease is deemed rejected as of the conclusion of the hearing on confirmation. If the lease is rejected, the stay under section 362 and any stay under section 1301 is automatically terminated with respect to the property subject to the lease.

3. 11 U.S.C. 502 provides in pertinent part:

Allowance of claims or interests

* * * * *

(g)(1) A claim arising from the rejection, under section 365 of this title or under a plan under chapter 9, 11, 12, or 13 of this title, of an executory contract or unexpired lease of the debtor that has not been assumed shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

* * * * *

4. 11 U.S.C. 1113 provides:

Rejection of collective bargaining agreements

(a) The debtor in possession, or the trustee if one has been appointed under the provisions of this chapter, other than a trustee in a case covered by subchapter IV of this chapter and by title I of the Railway Labor Act, may assume or reject a collective bargaining agreement only in accordance with the provisions of this section.

(b)(1) Subsequent to filing a petition and prior to filing an application seeking rejection of a collective bargaining agreement, the debtor in possession or trustee (hereinafter in this section "trustee" shall include a debtor in possession), shall--

(A) make a proposal to the authorized representative of the employees covered by such agreement, based on the most complete and reliable information available at the time of such proposal, which provides for those necessary modifications in the employees benefits and protections that are necessary to permit the reorganization of the debtor and assures that all creditors, the debtor and all of the affected parties are treated fairly and equitably; and

(B) provide, subject to subsection (d)(3), the representative of the employees with such relevant information as is necessary to evaluate the proposal.

(2) During the period beginning on the date of the making of a proposal provided for in paragraph (1) and ending on the date of the hearing provided for in

subsection (d)(1), the trustee shall meet, at reasonable times, with the authorized representative to confer in good faith in attempting to reach mutually satisfactory modifications of such agreement.

(c) The court shall approve an application for rejection of a collective bargaining agreement only if the court finds that–

(1) the trustee has, prior to the hearing, made a proposal that fulfills the requirements of subsection (b)(1);

(2) the authorized representative of the employees has refused to accept such proposal without good cause; and

(3) the balance of the equities clearly favors rejection of such agreement.

(d)(1) Upon the filing of an application for rejection the court shall schedule a hearing to be held not later than fourteen days after the date of the filing of such application. All interested parties may appear and be heard at such hearing. Adequate notice shall be provided to such parties at least ten days before the date of such hearing. The court may extend the time for the commencement of such hearing for a period not exceeding seven days where the circumstances of the case, and the interests of justice require such extension, or for additional periods of time to which the trustee and representative agree.

(2) The court shall rule on such application for rejection within thirty days after the date of the commencement of the hearing. In the interests of justice, the court may extend such time for ruling for such additional period as the trustee and the employees' representative may agree to. If the court does not

rule on such application within thirty days after the date of the commencement of the hearing, or within such additional time as the trustee and the employees' representative may agree to, the trustee may terminate or alter any provisions of the collective bargaining agreement pending the ruling of the court on such application.

(3) The court may enter such protective orders, consistent with the need of the authorized representative of the employee to evaluate the trustee's proposal and the application for rejection, as may be necessary to prevent disclosure of information provided to such representative where such disclosure could compromise the position of the debtor with respect to its competitors in the industry in which it is engaged.

(e) If during a period when the collective bargaining agreement continues in effect, and if essential to the continuation of the debtor's business, or in order to avoid irreparable damage to the estate, the court, after notice and a hearing, may authorize the trustee to implement interim changes in the terms, conditions, wages, benefits, or work rules provided by a collective bargaining agreement. Any hearing under this paragraph shall be scheduled in accordance with the needs of the trustee. The implementation of such interim changes shall not render the application for rejection moot.

(f) No provision of this title shall be construed to permit a trustee to unilaterally terminate or alter any provisions of a collective bargaining agreement prior to compliance with the provisions of this section.

5. 11 U.S.C. 1141 provides in pertinent part:

Effect of confirmation

* * * * *

(d)(1) Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan—

(A) discharges the debtor from any debt that arose before the date of such confirmation, and any debt of a kind specified in section 502(g), 502(h), or 502(i) of this title, whether or not—

(i) a proof of the claim based on such debt is filed or deemed filed under section 501 of this title;

(ii) such claim is allowed under section 502 of this title; or

(iii) the holder of such claim has accepted the plan; and

(B) terminates all rights and interests of equity security holders and general partners provided for by the plan.

* * * * *

6. 11 U.S.C. 365 (1976 Supp. III) provides in pertinent part:

Executory contracts and unexpired leases

(a) Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.

* * * * *

(g) Except as provided in subsections (h)(2) and (i)(2) of this section, the rejection of an executory contract or unexpired lease of the debtor constitutes a breach of such contract or lease—

(1) if such contract or lease has not been assumed under this section or under a plan confirmed under chapter 9, 11, or 13 of this title, immediately before the date of the filing of the petition; or

(2) if such contract or lease has been assumed under this section or under a plan confirmed under chapter 9, 11, or 13 of this title—

(A) if before such rejection the case has not been converted under section 1112 or 1307 of this title, at the time of such rejection; or

(B) if before such rejection the case has been converted under section 1112 or 1307 of this title—

(i) immediately before the date of such conversion, if such contract or lease was assumed before such conversion; or

(ii) at the time of such rejection, if such contract or lease was assumed after such conversion.

(h)(1) If the trustee rejects an unexpired lease of real property of the debtor under which the debtor is the lessor, the lessee under such lease may treat the lease as terminated by such rejection, or, in the alternative, may remain in possession for the balance of the term of such lease and any renewal or extension of such term that is enforceable by such lessee under applicable nonbankruptcy law.

(2) If such lessee remains in possession, such lessee may offset against the rent reserved under such lease for the balance of the term after the date of the rejection of such lease, and any such renewal or extension, any damages occurring after such date caused by the nonperformance of any obligation of the debtor after such date, but such lessee does not have any rights against the estate on account of any damages arising after such date from such rejection, other than such offset.

(i)(1) If the trustee rejects an executory contract of the debtor for the sale of real property under which the purchaser is in possession, such purchaser may treat such contract as terminated, or, in the alternative, may remain in possession of such real property.

(2) If such purchaser remains in possession—

(A) such purchaser shall continue to make all payments due under such contract, but may, offset against such payments any damages occurring after the date of the rejection of such contract caused by the nonperformance of any obligation of the debtor after such date, but such purchaser does not have

any rights against the estate on account of any damages arising after such date from such rejection, other than such offset; and

(B) the trustee shall deliver title to such purchaser in accordance with the provisions of such contract, but is relieved of all other obligations to perform under such contract.

* * * * *

No. 17-1657

IN THE

Supreme Court of the United States

MISSION PRODUCT HOLDINGS, INC.,
Petitioner,

v.

TEMPNOLOGY, LLC, N/K/A OLD COLD LLC,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

INTRODUCTION

The question here is what it means to "reject" an executory contract under §365 of the Bankruptcy Code. Is rejection the equivalent of a pre-bankruptcy breach of contract by the debtor? Or—as Tempnology argues (at 1)—is rejection an "extraordinary authority" to revoke *all* rights and interests the counterparty ever acquired under a contract, even those that would be unaffected by a pre-bankruptcy breach?

The Code answers that question: "[T]he rejection of an executory contract ... constitutes a breach of such contract ... immediately before the date of the filing of the petition." §365(g)(1). "Breach" means exactly what

it does at common law: a party's failure to fulfill its unperformed contractual obligations, giving the counterparty a claim for damages or other relief. Rejection thus enables the trustee to free the estate from the debtor's future performance obligations, while giving the counterparty a pre-petition claim for its resulting damages. But rejection cannot strip the counterparty of rights that a pre-petition breach would not affect. By definition, a breach relates only to contractual obligations *that have not yet been performed*. A breach does not allow the breaching party to undo past performance, unwind completed transactions, or take back interests in property already conveyed. Neither does rejection.

Say that, outside bankruptcy, one party sells another a toaster and, in the same contract, agrees to deliver a loaf of bread every week for two years. One year into the contract, the seller can breach: It can stop delivering bread and pay damages. But the seller's breach does not let it reclaim the toaster. As the seller, "I can yell 'I breach!' all I want, but I cannot force [the buyer] to give me the [toaster] back." Baird, *Elements of Bankruptcy* 118 (6th ed. 2014) ("Baird"). Because rejection is a breach, the same is true if the contract is rejected in bankruptcy: The estate can stop delivering bread, but it cannot take back the toaster. *Id.* at 118-119. Likewise, because "[o]utside of bankruptcy, a licensor's breach does not terminate a licensee's right to use intellectual property," rejection cannot terminate that right either. *Sunbeam Prods., Inc.* v. *Chicago Am. Mfg.*, 686 F.3d 372, 376-377 (7th Cir. 2012).

In Tempnology's view, however, rejection lets the debtor take back the toaster—or the right to its intellectual property—and sell it to someone else, even though the debtor could never accomplish that by

breaching its unperformed obligations outside bankruptcy. The great majority of courts and scholars have repudiated that view of rejection. It flouts the statute's plain text. It confuses rejection with the trustee's limited power to avoid certain pre-bankruptcy transactions. And it contravenes the Code's most fundamental interpretive principle: Parties' substantive rights in bankruptcy are governed by applicable non-bankruptcy law unless the Code clearly provides otherwise. In short, Tempnology's view of rejection is "fundamentally contrary to general bankruptcy principles, to the history and purpose of executory contracts doctrine itself, and to common sense." Andrew, *Executory Contracts in Bankruptcy*, 59 U. Colo. L. Rev. 845, 849 (1988) ("Andrew").

All this is set out in Mission's opening brief. Tempnology has little to offer in response. Lacking any textual foothold in the statute, it relies on a snippet of out-of-context language from *Bildisco* that has no bearing on the question here. It attempts to draw from §365's structure a negative inference regarding Congress's intent that is refuted by context, history, and Congress's own contemporaneous explanations of its actions. And it argues that reorganizing would be easier if debtors could trample other parties' rights. But the Bankruptcy Code respects those rights, and courts are bound by Congress's judgment.

Tempnology also claims that trademark licenses are different from other contracts and that licensees' rights must therefore disappear upon rejection. But the distinctions Tempnology cites are immaterial; it never explains why they justify a special rule of rejection for trademark licenses.

Finally, Tempnology argues this case is moot. It is not. The question presented encompasses all Mission's rights under the parties' agreement. And even if it were limited to Mission's trademark rights, Mission is seeking damages for the loss of those rights following rejection. While Tempnology argues Mission is not entitled to damages, that is an argument on the merits of Mission's claim, not an argument for mootness.

ARGUMENT

I. REJECTION DOES NOT TERMINATE CONTRACTS OR REVOKE PROPERTY INTERESTS CONVEYED PRE-BANKRUPTCY

A. Rejection Is A Breach, Not An Avoidance Power

Tempnology contends (at 18, 29) that rejection is a "unique power within bankruptcy" to terminate an executory contract and "reduce[] all of the non-debtor's non-bankruptcy rights"—including interests in the debtor's assets conveyed to the counterparty before bankruptcy—"to a 'claim' for monetary damages." Tempnology is wrong. Pet. Br. 16-35.

1. The Code specifies that rejection "constitutes a breach" of the contract "immediately before the date of the [bankruptcy] filing." §365(g). Tempnology never comes to grips with that crucial statutory language. It argues (at 29-30) that §365(a)'s use of the word "reject," rather than "an existing concept from non-bankruptcy law," shows Congress "intentionally created a unique power" to modify the substantive rights of parties to a contract. But §365(g) defines "rejection" as a "breach"—a well-understood "existing concept from non-bankruptcy law." That clear statutory text is fatal to Tempnology's argument.

Likewise, Tempnology contends (at 28-32) that "rejection ... reduces all of a non-debtor counterparty's non-bankruptcy rights" to a pre-petition damages claim. In support of that argument, it emphasizes that the term "claim" is broad and includes all liability for damages caused by rejection, and it argues that "the *entire* contract" must be assumed or rejected. But those points simply beg the question what effect rejection has on the counterparty's rights—they do nothing to answer the question.

As explained, rejection is a breach of the debtor's as-yet unperformed obligations under the contract, not a revocation of past performance. Damages from the breach of those future obligations—including "unmatured," "contingent," or "unliquidated" damages, §101(5)—are treated as a pre-petition claim and may be discharged in bankruptcy, §1141. In that sense, rejection "reduces" the counterparty's *right to the debtor's future performance* to a pre-petition claim. But it does not follow that all the counterparty's *other* rights acquired under the contract vanish (or are "reduce[d]" to a pre-petition claim) upon rejection. Rejection does not affect rights that breach outside bankruptcy would not affect.[1]

One important facet of that principle is that rejection is not an avoidance power. If a debtor transfers an interest in its property—such as a lien, lease, or license—to a counterparty before bankruptcy, the debtor's property enters the estate subject to the counterparty's interest. *Board of Trade of City of Chicago* v.

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[1] *City Bank Farmers Trust Co.* v. *Irving Trust Co.*, 299 U.S. 433 (1937), is not to the contrary. It simply holds that a debtor-tenant's *unpaid future rent* under a rejected lease is a pre-petition claim that can be discharged.

Johnson, 264 U.S. 1, 11 (1924).[2] Rejection cannot undo the transfer and take back the interest in property. That can be accomplished only through a fraudulent-transfer, preference, or other avoidance action under §§541-550 of the Code. And such actions can be brought only in narrow circumstances—such as when the debtor, while insolvent, transferred its property for less than reasonably equivalent value, reducing the assets available to pay creditors. §548(a)(1)(B); Pet. Br. 25-26.

Tempnology claims (at 48-49) that references to "avoidance" are "red herrings." But on Tempnology's view, rejection *does* operate as avoidance, clawing back interests in property previously transferred to the counterparty. Tempnology argues rejection differs from avoidance because it gives the counterparty an unsecured pre-petition claim. But avoidance gives the transferee at least that, §502(h), and in the case of a good-faith transferee of a fraudulent transfer, gives the transferee more than that: a lien on the recaptured property for the full value it paid, §548(c). On Tempnology's theory, rejection takes back interests in property that could not be reclaimed through the Code's avoidance provisions and gives the counterparty cents on the dollar in return. That is not how rejection—or

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[2] Tempnology's efforts (at 46-47) to evade *Chicago Board of Trade* are feeble. Tempnology says the case is old, but it established a foundational bankruptcy principle that "remains good law" today. Baird 96-97; Pet. Br. 24-25, 28-29, 37. And Tempnology's complaint that it did not involve rejection misses the point. The case holds that the debtor's assets enter the estate subject to other parties' rights—whatever form those rights may take—that would limit the debtor's use of those assets outside bankruptcy. Tempnology's view violates that principle by permitting rejection to expand the estate's interests in property beyond what the debtor had.

the Bankruptcy Code in general—works. Simply put, the Code respects non-bankruptcy property rights. *Butner* v. *United States*, 440 U.S. 48, 55 (1979); Pet. Br. 19-29.

2. Lacking a stronger basis for its novel view, Tempnology relies (at 28-30) on a misreading of *NLRB* v. *Bildisco & Bildisco*, 465 U.S. 513 (1984). It seizes on *Bildisco*'s statement that the collective bargaining agreement at issue in that case was "not an enforceable contract," *id.* at 532. It then leaps to the conclusion that rejection extinguishes all rights the counterparty ever acquired under the contract, leaving it a pre-petition damages claim as its sole remedy. *Bildisco* did not hold—or even suggest—any such thing.

In *Bildisco*, the debtor-in-possession stopped paying certain wages and benefits under a CBA before deciding to assume or reject it under §365. 465 U.S. at 517-518. The NLRB found that the debtor-in-possession had unilaterally terminated provisions of a CBA that was "in effect" and thus violated the National Labor Relations Act. *Id.* at 519-520 & n.5. *Bildisco* held that a debtor-in-possession does not violate the NLRA by failing to adhere to a CBA's terms before it is assumed or rejected. *Id.* at 531-534. The Court noted that Chapter 11 gives debtors-in-possession a window of time to assume or reject a contract, and NLRB proceedings during that window would constrict that "breathing space." *Id.* at 532. And it reasoned that rejection of the CBA would "constitute[] a breach" deemed to occur immediately before filing and redressable through a pre-petition claim. *Id.* at 530-532. Accordingly, it concluded "that from the filing of a petition in bankruptcy until formal [assumption], the [CBA] is not an enforceable contract *within the meaning of [the] NLRA*." *Id.* at 532 (emphasis added).

Tempnology dramatically overreads *Bildisco*. *Bildisco* held only that before the assumption or rejection of a CBA, it could not be enforced against the debtor-in-possession *under the NLRA*. It did not hold that a rejected contract is never enforceable in any way; rather, it recognized that rejection is a breach of the debtor's future obligations, giving rise to a pre-petition claim. (After all, an unenforceable agreement cannot be breached.) *Bildisco* certainly did not hold that rejection retroactively terminates all the counterparty's rights under an executory contract, including interests in assets—such as an intellectual-property license—conveyed before bankruptcy.

B. Section 365(n) And Similar Provisions Do Not Suggest That Rejection Terminates Contracts Or Avoids Interests In Property

With no affirmative basis in the text for its position, Tempnology attempts to draw a negative inference from §365's structure. It notes that certain subsections of §365—(h), (i), and (n)—expressly state that rejection does not affect the counterparty's rights in estate assets. Tempnology asserts (at 33-41) that these "exceptions" prove the existence of a "general rule" that rejection "terminates" such rights—although the purported "general rule" appears nowhere in the statute. In fact, no such "general rule" exists, and the subsections Tempnology relies on refute, rather than bolster, its view of rejection.

1. Tempnology ignores the overwhelming evidence that Congress adopted §365(n) to correct *Lubrizol Enterprises* v. *Richmond Metal Finishers, Inc.*, 756 F.2d 1043 (4th Cir. 1985). *Lubrizol* wrongly held that rejection terminated a patent licensee's rights, leaving the licensee only a pre-petition damages claim. As the

Senate Report explained, §365(n) "make[s] clear" that rejection is merely a "breach ... of affirmative ongoing performance," and "cannot ... unilaterally cut off" licensees' "rights ... to use the licensed property"—"a result ... never intended by Congress in enacting [§]365." S. Rep. No. 100-505, at 3200-3201 (1988); Pet. Br. 45-50.

Tempnology argues that if Congress had believed *Lubrizol* was wrongly decided, it would have revised §365's general provisions rather than adding an "exception." But the House Report explained that, while a "comprehensive re-working of [§]365" might be the "best way in the long run of dealing with" the issue, *Lubrizol*'s "chilling effect" on intellectual-property licensing was a "serious[] ... problem" that required an urgent fix "now." H.R. Rep. No. 100-1012, at 3-4 (1988). Congress responded to that problem by clarifying the law in the area of immediate concern, rather than revamping the entire statutory scheme. Pet. Br. 47-48.

2. The other "exceptions" Tempnology cites were similarly enacted to make clear that rejection does not deprive counterparties of all interests acquired under a rejected contract, often overruling judicial decisions that interpreted rejection too broadly. None of the so-called "exceptions" was viewed as *changing* the law or creating a special exemption from a general rule of termination; all were treated as *clarifying* the law's application to certain types of contracts.

For instance, the protections for lessees of real property now embodied in §365(h) were initially enacted in 1938 as §70(b) of the Bankruptcy Act, in response to uncertainty regarding the effect of rejection on les-

sees' rights.[3] Section 70(b) provided that a landlord's rejection "shall not deprive the lessee of his estate"—that is, the tenant would not lose the right of possession. The provision's principal drafter explained that it would clarify that rejection permits a landlord to "repudiate ... obligations" "such as ... repairs" but does not "forfeit[] the tenant's [leasehold] estate." McLaughlin, *Amendment of the Bankruptcy Act*, 40 Harv. L. Rev. 583, 609 (1927); National Bankruptcy Conference, *Analysis of H.R. 12889*, 74th Cong., 2d Sess. 227-228 & n.3 (Comm. Print 1936) (§70(b) is "clarifying"); Andrew 861 n.75, 902-903.

But the phrase "shall not deprive the lessee of his estate" continued to generate divergent interpretations. Report of Commission on Bankruptcy Laws, H.R. Doc. No. 93-137, pt. II at 153, 157 (1973) ("Commission Report"). Accordingly, when the Bankruptcy Code was adopted in 1978, §70(b) was replaced with §365(h), which provided, more clearly, that rejection did not revoke the lessee's right to "remain in possession" of the property (including for "any renewal or extension of such term that is enforceable" under nonbankruptcy law). H.R. Rep. No. 95-595, at 349 (1977) ("Thus the tenant will not be deprived of his estate"); S. Rep. No. 95-989, at 60 (1978) (same); Andrew 903 n.200. In 1994, Congress further clarified §365(h), overruling cases holding that rejection terminated the lessee's rights "in or appurtenant to the real property" (such as

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[3] *Compare American Brake Shoe & Foundry Co.* v. *New York Rys. Co.*, 278 F. 842, 843-844 (S.D.N.Y. 1922) (receiver for landlord can stop furnishing utilities under lease but cannot evict tenant), *with Coy* v. *Title Guarantee & Trust Co.*, 198 F. 275, 279-282 (D. Or. 1912) (receiver for landlord can terminate tenant's occupancy notwithstanding right of renewal).

rental terms, subletting, and assignment). H.R. Rep. No. 103-835, at 45 & n.12 (1994).

Likewise, when the Code was adopted in 1978, Congress enacted §365(i), which responded to concerns about decisions stripping buyers in possession of real property purchased under land-sale contracts of their interests in the property. Commission Report, pt. I at 199, pt. II at 158; Lacy, *Land Sale Contracts in Bankruptcy*, 21 UCLA L. Rev. 477, 478-485 (1973) (urging legislation to overturn decision holding rejection terminated purchaser's equitable interest in property); Andrew 906-912. And in 1984, Congress amended §365(h) and §365(i) by adding similar protections for timeshare purchasers, overruling contrary decisions. S. Rep. No. 98-65, at 50 (1983) ("[t]his ... legislation is urgently needed" because "[c]ourts have refused" to recognize timeshare purchasers' rights).

That history of enacting specific responses to specific concerns has doubtless resulted in a statute less elegant than one written on a blank slate. But today's Bankruptcy Code is a palimpsest: the result of an accretion of statutory provisions enacted over many decades, overlaid on an even older common-law base. It is not always simple to sweep away all traces of a term with deep historical roots. Congress's choice to correct misinterpretations, and provide tailored solutions to problems, as they arose—rather than start from scratch to redraft a central provision of the Code—should not obscure the plain meaning of "rejection" as the statute itself defines it.

3. Tempnology also cherry-picks a few words from §365 that it claims support its view. They do not.

First, Tempnology notes (at 34-35) that §365(h), (i), and (n) allow the counterparty to treat a rejected con-

tract as "terminated"—purportedly showing that under the "default rule," rejection is termination. In fact, those provisions confirm that rejection is a breach, not a termination.

Specifically, (h), (i), and (n) give the right to "terminate" a rejected contract to the *counterparty*, not the *trustee*. Those provisions reflect the basic contract principle that a material breach entitles the *non-breaching* party to treat the contract as terminated or continue performance and seek breach-of-contract damages. Neither §365 nor contract law permits the *breaching* party to use its own breach to declare the contract terminated. Pet. Br. 39-40, 44.

Second, Tempnology notes that §365(g) begins with the phrase "[e]xcept as provided in subsections (h)(2) and (i)(2),"[4] which it claims shows that the rights counterparties retain under subsections (h) and (i) are "exceptions" to §365(g)'s "general rule" of termination. This, too, is wrong.

Section 365(g) states that "[e]xcept as provided in subsections (h)(2) and (i)(2), the rejection of an executory contract ... constitutes a breach of such contract" giving rise to a damages claim. Subsections (h)(2) (now (h)(1)(B)) and (i)(2), in turn, provide that a counterparty that retains its rights under a rejected contract has no claim for damages from rejection (except a right of set-off). Those subsections are thus exceptions to the general rule that rejection gives rise to a claim for breach-of-contract damages—*not* to a general rule of termination.

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[4] Section 365(g)'s cross-references were not conformed after the 1984 amendments. "Subsection (h)(2)" thus refers to what is now subsection (h)(1)(B).

Notably, subsections (h)*(1)* (now (h)(1)(A)) and (i)*(1)* are *not* excepted from §365(g). And it is *those* subsections that recognize the counterparty's right to "remain in possession" of the property. Thus, the provisions affirming that the counterparty's rights survive rejection are *not* exceptions to §365(g)'s "general rule"—further evidence that §365(g) cannot mean what Tempnology claims.

4. Tempnology also relies (at 35-36) on §1113. That provision overruled *Bildisco*'s holding that a debtor-in-possession could breach a CBA before rejection without violating the NLRA's prohibition on unilateral termination of a CBA's terms. 465 U.S. at 519 & n.5, 532-534; 29 U.S.C. §185(d). Section 1113 provides that a trustee may *not* "unilaterally terminate or alter any provision of a [CBA]" without first complying with a detailed bargaining process over a modified CBA and demonstrating the modifications are necessary to the reorganization, §1113(f), unless the court delays unduly in ruling on the rejection motion, §1113(d)(2).

Tempnology claims that the word "terminate" *in §1113* "confirm[s]" that rejection *under §365* terminates all rights a counterparty acquires under a contract. It does not. Rejection under §1113 is quite different from rejection under §365. Rather than constituting a "breach" of an existing contract, rejection under §1113 abrogates the existing CBA and replaces it with a new one. Courts have recognized that key difference: "[U]nder §365, if a debtor rejects an executory contract, 'it does not completely terminate the contract,'" which remains in force. *In re Northwest Airlines Corp.*, 483 F.3d 160, 170 (2d Cir. 2007). But "[c]ontract rejection under §1113, unlike contract rejection under §365, permits more than non-performance; it allows one party, with the court's approval, to establish *new*

terms." *Id.* at 171. Far from showing that rejection under §365 amounts to termination, §1113 shows the opposite: Congress knew how to provide for termination when it wanted, and it did not do so in §365.

5. Finally, the *expressio unius* and superfluity canons (Resp. Br. 37-41) do not help Tempnology. Those canons recognize that when Congress creates exceptions to a general rule, it is typically reasonable to infer that Congress does not intend other exceptions, or for the rule to apply so broadly that it swallows the exceptions. But those inferences are reasonable only if the underlying premise—that Congress *has* created exceptions to a contrary general rule—is correct. Here, the premise is not correct: Subsections (h), (i), and (n) are not "exceptions" to a "general rule" of "termination." Rather, they clarify the application of the general rule that rejection is a breach to specific contracts.

Moreover, *expressio unius* is not a mechanical rule that trumps other indications of a statute's meaning. "The force of any negative implication ... depends on context," and "the *expressio unius* canon ... can be overcome by 'contrary indications that [the language] was probably not meant to signal any exclusion.'" *Marx* v. *General Revenue Corp.*, 568 U.S. 371, 381 (2013). Tempnology's wooden application of the canon fails because it altogether ignores context—the other words of the statute, the statute's history, and basic bankruptcy principles. And its argument is no stronger with respect to trademark licenses. Pet. Br. 45-50.

The canon against superfluity likewise does not support Tempnology. A provision is "not ... superfluous if Congress included it to remove doubt"—which is the case here. *Marx*, 568 U.S. at 385. Moreover, (h), (i),

and (n) do more than remove doubt. The consequences of breach are normally governed by state law. Subsections (h), (i), and (n) create bankruptcy-specific remedial schemes for particular categories of contracts, which benefit the licensee by eliminating uncertainty but differ in certain respects from state law. For instance, those provisions limit the counterparty's remedy for the breach (no damages beyond setoff in (h) and (i), damages but no setoff in (n)). Recognizing that rejection is a breach hardly turns a specific federal remedy for that breach into surplusage.[5]

C. Bankruptcy Policy Does Not Support Tempnology

Tempnology argues (at 41-42, 58-62) that empowering debtors-in-possession to terminate trademark licenses would maximize the marks' value and facilitate reorganization. But the Bankruptcy Code does not permit anything and everything that might further reorganization. Congress did not "'ha[ve] a single purpose in enacting'" the Code; rather, it balanced multiple competing interests through the careful and reticulated scheme set out in the statute. *Florida Dep't of Revenue* v. *Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 51 (2008). In §365, Congress enabled estates to avoid the burden of continuing performance under executory contracts, but

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[5] Tempnology objects (at 40) that if the general rule is "more favorable to licensees" than §365(n), licensees would never "choose the statutory 'exception.'" But even if the general rule were viewed as more favorable, licensees are not entitled to "choose." If a licensee falls within §365(n), §365(n) provides its sole remedy. "'It is a commonplace of statutory construction that the specific governs the general.'" *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 566 U.S. 639, 645 (2012) (debtor could not proceed under more favorable general provision when plan fell within more restrictive specific provision).

it did not grant the power to take back rights already conveyed—even if that would make reorganizing easier. Pet. Br. 55-56.

Tempnology also invokes (at 42-43) equality of distribution among creditors. Respecting a licensee's rights in the debtor's intellectual property does not violate that policy, but upholds it. Bankruptcy aims to treat *similarly situated* creditors alike, but not all creditors are similarly situated. A creditor with an interest in the debtor's property conveyed before bankruptcy has a right to that property that is superior to that of other creditors. *Chicago Board of Trade*, 264 U.S. at 11. Outside bankruptcy, a debtor's other creditors could not seize a licensee's rights in the debtor's intellectual property to satisfy a debt. The same is true in bankruptcy: Absent a fraudulent transfer, a debtor's other creditors are not entitled to a licensee's rights. Recognizing that those rights persist after rejection thus gives the licensee only its due. Baird 96, 120-122.

II. Rejection Of The Agreement Did Not Terminate Mission's Rights

A. Rejection Did Not Terminate Mission's Trademark Rights

1. As demonstrated, rejection affords the estate no greater rights than the debtor would have if it breached the contract outside bankruptcy. Tempnology fails to dispute—and thus concedes—that it could not have revoked Mission's trademark license by breaching its obligations under the agreement outside bankruptcy. It follows that Tempnology could not do so by rejecting the agreement in bankruptcy. That is sufficient to resolve the issue of Mission's trademark rights.

2. Rejection also could not have terminated Mission's trademark license because the license is an interest in Tempnology's property that, under the principle of *Chicago Board of Trade*, never entered the bankruptcy estate and can be reclaimed only through an avoidance action.[6]

Tempnology contends that a non-exclusive trademark license is not an "interest in property" under trademark law. That is both wrong and irrelevant. At the outset, there is no question that a trademark is property and a license to use the trademark is an interest in that property. The leading treatise flatly states that "[a] trademark is a property right." 1 *McCarthy on Trademarks and Unfair Competition* §2:10 (5th ed. 2017) ("*McCarthy*"). It is "a bundle of rights in intellectual property" in "the same way" that "a 'fee simple' in real estate" is a "bundle of legal rights." *Id.* And, "like any 'property right,'" a trademark can be "bought and sold (assigned) and rented out (licensed)." *Id.* Of course, a licensee does not *own* the licensed trademark. But a licensee has an interest in the trademark nonetheless, just as a renter has a leasehold interest in real estate without owning it. 3 *McCarthy* §18:52 (analogizing trademark license to real-property lease).

Tempnology argues that a trademark is a unique form of property, in which the "sticks in the bundle" of

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[6] Mission does not argue, as Tempnology suggests (at 44-45), that because a contract can be characterized as "property," all rights under the contract are therefore "interests in property." Rejection breaches the counterparty's right to receive the debtor's future performance and substitutes damages. But when a contract conveys an interest in a *distinct underlying asset*—real property, personal property, or intellectual property—before bankruptcy, that asset enters the estate subject to the counterparty's interest, and rejection does not claw that interest back.

property rights can never be separated. Not so. Trademarks differ from other intellectual property in that their value comes from their status as signifiers of quality, and thus they cannot be sold without the business's goodwill. Relatedly, as Tempnology stresses, trademark licensors must exercise quality control over their licensees or risk abandonment of the mark. But it does not follow that a licensee cannot have a property interest in a trademark. That is what a license is—the grant of an interest in the licensed property. *See, e.g.*, *Krebs Chrysler-Plymouth, Inc.* v. *Valley Motors, Inc.*, 141 F.3d 490, 498 (3d Cir. 1998) (under applicable state law, "[t]rademarks are property, and franchises are licenses to use such property"; therefore, "franchises are interests in property").[7]

In any event, the relevant question is not whether a trademark license is an interest in property under trademark law, but whether it is an interest in property under bankruptcy law. *Chicago Board of Trade*, 264 U.S. at 8-10; Pet. Br. 23-25, 37. And, crucially, Tempnology never disputes that, outside bankruptcy, it could not have sold or assigned the trademarks free of Mission's license—demonstrating that the license is, for bankruptcy purposes, a property interest in the trademarks themselves, not a mere "contract right." Andrew 920-924; Pet. Br. 37-38; *Krebs*, 141 F.3d at 498 (trademark license is interest in property for bankruptcy purposes); *In re GGW Brands, LLC*, 504 B.R. 577, 592-593, 630-631 (Bankr. C.D. Cal. 2013) (same); *In re Specialty Foods of Pittsburgh*, 91 B.R. 364, 374 (Bankr.

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[7] It does not matter whether the license is exclusive or non-exclusive. Tempnology argues that the hallmark of a property interest is the right to exclude. Here, however, Tempnology gave that right up by licensing its marks to Mission, relinquishing a stick in its "bundle of legal rights." 1 *McCarthy* §2:10.

W.D. Pa. 1988) (same). Tempnology's trademarks thus entered the bankruptcy estate subject to Mission's rights, and rejection could not expand the estate's rights by revoking Mission's license.

As for Tempnology's parade of horribles (at 58-60) trumpeting the harm to trademark owners if licensees' rights are respected, suffice it to say that every association of trademark owners and professionals that has weighed in on this case has the opposite view. It is Tempnology's proposed rule that will harm trademark licensors and licensees alike, making licensees' rights uncertain and hampering licensors' ability to commercialize their intellectual property.

3. Tempnology also complains (at 32-33, 52, 61-62) that Mission is not entitled to an administrative claim for the post-petition violation of its rights. That argument reflects Tempnology's basic misunderstanding of rejection. Rejection is a breach of the debtor's future performance obligations deemed to occur pre-petition, requiring the resulting damages to be asserted as a pre-petition claim. Here, however, Mission's claim does not arise from Tempnology's deemed *pre-petition* breach of its future performance obligations—which is all that rejection can lawfully accomplish—but from the estate's *post-petition* interference with rights Mission lawfully retained after rejection. Under basic bankruptcy principles, when the estate takes actions post-petition that wrongfully injure a third party, the estate's liability to that party is an administrative expense. §503(b)(1)(A); *Reading Co.* v. *Brown*, 391 U.S. 471, 483-485 (1968).

B. Rejection Did Not Terminate Mission's Exclusivity Rights

1. Again, Tempnology does not dispute that it could not have revoked Mission's exclusivity rights by breaching the parties' agreement outside bankruptcy (instead wrongly arguing (at 61) that the effect of breach outside bankruptcy is irrelevant). Tempnology thus could not revoke Mission's exclusivity rights by rejecting the agreement in bankruptcy. That is sufficient to resolve the issue.

2. Likewise, rejection could not terminate Mission's exclusivity rights because they are an interest in Tempnology's property conveyed before bankruptcy. The parties' agreement gave Mission the exclusive right to sell certain products practicing Tempnology's patents within the United States. Tempnology contends (at 60) that this was merely a contractual "distribution" right, not a "license" to intellectual property, but as this Court established long ago, "[a]ny language used by the owner of the patent ... consent[ing] to [another's] use of the patent in ... selling it ... constitutes a license." *De Forest Radio Tel. Co.* v. *United States*, 273 U.S. 236, 241 (1927). And Tempnology does not contest that, outside bankruptcy, it could not have sold or assigned its intellectual property free of Mission's exclusivity rights. Pet. Br. 42-44. Tempnology's estate stood in no better position, and rejection did nothing to change that.

3. Tempnology wrongly contends (at 21-23) that Mission's exclusivity rights are outside the question presented. This Court denied review of the First Circuit's holding that Mission's exclusivity rights were not exclusive "right[s] to intellectual property" protected

by *§365(n)*. The issue here, however, is rejection's effect on Mission's exclusivity rights under *§365(g)*.

That issue is squarely encompassed by the question presented: "Whether a debtor-licensor's rejection of a license agreement—which 'constitutes a breach of such contract,' 11 U.S.C. §365(g)—terminates rights of the licensee that would survive the licensor's breach under applicable non-bankruptcy law." Pet. i. Mission's exclusivity rights are "rights of the licensee" under the contract, and the question whether rejection terminated them is "fairly included" within the question presented. S. Ct. R. 14.1(a). The petition made that clear several times (at 15 n.4, 20, 25-26), not only in a footnote. This Court thus has the discretion either to determine the application of the legal rule it articulates to Mission's exclusivity rights, or to leave that exercise to the courts below on remand.

III. This Case Is Not Moot

This is a live dispute. Mission suffered an "actual injury"—the estate's post-petition interference with its rights—that can "be redressed" by a reversal. *Chafin* v. *Chafin*, 568 U.S. 165, 172 (2013). Mission unquestionably has a concrete interest in the outcome of this dispute—a claim for money damages. Such claims are virtually never moot. 13C Wright et al., *Federal Practice and Procedure* §3533.3 (3d ed. 2018). This case is no exception.

Tempnology argues (at 21-27) that this Court rendered this case moot by granting certiorari only on question 1. Tempnology effectively concedes that Mission's claim for the violation of its exclusivity rights remains live, but argues that Mission's exclusivity rights fall outside the question presented. And, Temp-

nology claims, Mission's trademark rights are not sufficient to keep this case alive because Mission purportedly suffered no damages from the violation of those rights, and the estate may be administratively insolvent. According to Tempnology, it is now "impossible for the [C]ourt to grant any effectual relief."

Each step of this reasoning is wrong. As discussed above, Mission's exclusivity rights are "fairly included" within the question presented, which encompasses all "rights of the licensee" under the parties' license agreement—not just trademark rights.

In any case, Mission's claim with regard to its trademark rights is not moot either. By seeking and obtaining an unlawful order that Mission was not entitled to use the trademarks post-rejection, the estate deprived Mission of the incremental profits Mission would have earned had it been able to use them. As Mission explained below, it "suffered damages as a result of its inability to use the trademarks after the rejection." JA572.[8]

Tempnology argues that Mission suffered no damages because it never used the trademarks after rejection—a strange argument, since that is precisely why Mission *did* suffer damages. And it claims that since the bankruptcy court did not formally enjoin Mission's use of the trademarks—but merely issued an order

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[8] Tempnology contends (at 3-4) that Mission's initial proof of claim did not specifically assert damages for the post-rejection loss of its trademark rights. But there was no requirement—and no reason—for Mission to break down its damages that way. Its proof of claim included all damages attributable to the violation of its rights under the license agreement. JA556-557. In any event, if Mission prevails in this appeal, it will assert an administrative claim for its post-rejection damages; its proof of claim will not circumscribe the damages to which it is entitled. §503(a).

providing Mission had no legal right to use them—Mission was required to use the trademarks and risk contempt of court or else forfeit any damages. Tempnology offers no support whatever for this argument. In any event, it is irrelevant. Boiled down, Tempnology's contention is merely that, on the merits, Mission is not entitled to damages. And a dispute over the merits of a claim—assuming that claim is not completely frivolous, as Mission's is not—does not make that claim moot. It is settled law that "whether [the plaintiff] has established a right to recover" and "his prospects of success are ... not pertinent to the mootness inquiry." *Chafin*, 568 U.S. at 174.

Finally, Tempnology suggests (at 27) that Mission cannot obtain "effectual" relief because the estate's cash has been distributed to S&S. But "the fact that a defendant is insolvent does not moot a claim for damages." *Chafin*, 568 U.S. at 175-176. And here, Mission has multiple potential sources of recovery. Mission has appealed the order distributing the cash to S&S, which could be required to return it if Mission prevails. JA190. Mission could also seek an order requiring other administrative claimants to disgorge their recoveries to permit a pro rata distribution among all administrative claimants, including Mission. §§502(j), 726(b). In addition, Mission has asserted a claim directly against S&S for damages for the post-rejection deprivation of its rights, which has been stayed pending this Court's resolution of this case. JA133, 178.

In short, this case is not moot.

CONCLUSION

The First Circuit's judgment should be reversed.

Respectfully submitted.

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No. 17-1657

In the Supreme Court of the United States

MISSION PRODUCT HOLDINGS, INC., PETITIONER

v.

TEMPNOLOGY, LLC, NKA OLD COLD LLC

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Section 365 of the Bankruptcy Code provides that the bankruptcy trustee, "subject to the court's approval, may assume or reject any executory contract," *i.e.*, a contract under which both parties still have performance obligations. 11 U.S.C. 365(a). The trustee's rejection of a contract pursuant to that authority "constitutes a breach of such contract." 11 U.S.C. 365(g). It is undisputed that, if a trustee "rejects" and thus breaches an executory contract by halting performance, the counterparty may file a claim against the estate for damages caused by the non-performance. The question presented is as follows:

When a debtor has entered into a pre-bankruptcy contract that granted a counterparty a license to use the debtor's trademark, does the debtor's "rejection" of the contract that granted the license have the effect of revoking the license itself?

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INTEREST OF THE UNITED STATES

Section 365 of the Bankruptcy Code, 11 U.S.C. 365, provides that the bankruptcy trustee, "subject to the court's approval, may assume or reject any executory contract," *i.e.*, any contract under which both parties still have obligations to perform. 11 U.S.C. 365(a). The trustee's rejection of a contract pursuant to that authority rejection "constitutes a breach of such contract." 11 U.S.C. 365(g). It is undisputed that, if the trustee "rejects" such a contract and thus chooses to stop performing the debtor's obligations under it, the counterparty may file a claim against the estate for damages caused by the non-performance.

The court of appeals held in this case that, when the debtor has previously granted a counterparty a license to use the debtor's trademark, the trustee's later "rejection" of the contract that granted the license has the

legal effect of terminating the license itself. The United States Patent and Trademark Office plays a central role in the administration of the federal trademark system. See Lanham Act, 15 U.S.C. 1051 *et seq.* The United States has a strong interest in ensuring that trademarks serve as reliable symbols of source in consumer transactions and that trademark owners obtain the full value of the goodwill associated with their marks, while also protecting the pro-competitive nature of trademarks and the stability of trademark licenses. The court of appeals' reasoning, moreover, is not limited to trademark licenses, and may implicate the interests of the United States and its agencies as creditors in bankruptcy proceedings under federal programs involving loans, contracts, leases, assistance and benefit payments, and tax-collection activities. Finally, United States Trustees are charged with supervising the administration of bankruptcy cases. See 28 U.S.C. 581-589a. The United States therefore has a substantial interest in the resolution of the question presented.

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Bankruptcy Code are reprinted in an appendix to this brief. App., *infra*, 1a-17a.

STATEMENT

1. Respondent Tempnology, LLC, developed cooling fabrics for towels, socks, headbands, and other accessories that were "designed to remain at low temperatures even when used during exercise." Pet. App. 2a. Respondent marketed those products under the brand name "Coolcore," and it has registered trademarks associated with that brand. *Id.* at 2a-3a.

In 2012, Tempnology entered into a "Co-Marketing and Distribution Agreement" (the Agreement) with petitioner Mission Product Holdings, Inc. Pet. App. 3a. The Agreement called for Mission to distribute Coolcore clothing and accessories for several years, subject to automatic one-year renewals. *Ibid.*; see *id.* at 105a-106a. Tempnology granted Mission (1) a "non-exclusive, non-transferable, limited license" to use the Coolcore mark; and (2) exclusive rights to distribute certain Coolcore products in the United States. *Id.* at 3a-4a.[1] The Agreement gave Tempnology "the right to review and approve" Mission's uses of the mark that had not been preapproved; required Tempnology to indemnify Mission for any failure of Tempnology's products to meet quality-control standards; and required Tempnology to protect its intellectual property from third parties. *Id.* at 4a; see J.A. 237-238, 244-245 (Agreement ¶¶ 15(d), 20(c)).

The Agreement also established a process for unwinding the relationship. In particular, it permitted either party to terminate the relationship without cause, subject to a two-year "Wind-Down Period" during which both parties would retain their rights. Pet. App. 4a. (If either party failed to cure a material breach within 90 days, the Agreement allowed the other party to terminate immediately. J.A. 207.) Tempnology thus could not unilaterally terminate Mission's license and

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[1] The Agreement also granted Mission a non-exclusive license to practice certain Tempnology patents. Pet. App. 3a-4a. It is undisputed that Mission retained that license notwithstanding Tempnology's rejection of the Agreement. *Id.* at 6a; see 11 U.S.C. 101(35A). 365(n).

exclusive-distribution rights during the wind-down period. In June 2014, Mission initiated the two-year wind-down period. *Ibid.*

b. At approximately the same time, Tempnology's "financial outlook dimmed." Pet. App. 5a. On September 1, 2015, Tempnology filed a voluntary petition for Chapter 11 bankruptcy. *Ibid.*

Chapter 11 of the Bankruptcy Code establishes a framework for reorganization of a bankrupt business. See 11 U.S.C. 1101-1174. Filing a petition for bankruptcy creates a bankruptcy "estate," which is administered by a "trustee" and generally consists of all the debtor's rights and assets. 11 U.S.C. 323, 541(a). In Chapter 11 cases, the debtor itself is ordinarily given the powers and duties of the trustee, and is called a "debtor in possession." See 11 U.S.C. 1101(1), 1107(a). Here, Tempnology was a debtor in possession with the powers of a trustee.

2. a. The day after it filed the bankruptcy petition, Tempnology moved to "reject" the Agreement pursuant to 11 U.S.C. 365(a). Section 365 provides that the "trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor." *Ibid.* A contract is executory if "performance remains due to some extent on both sides." *NLRB* v. *Bildisco & Bildisco*, 465 U.S. 513, 522 n.6 (1984) (citation omitted). "Executory contracts thus represent both an asset—the debtor's right to obtain the counterparty's future performance—and a liability—the debtor's obligation to perform in the future." Pet. Br. 17.

Rejection of an executory contract or unexpired lease "constitutes a breach of such contract or lease," deemed to occur "immediately before the date of the filing of the [bankruptcy] petition." 11 U.S.C. 365(g) and

(g)(1). The counterparty thus may file a pre-petition claim against the estate for damages caused by the non-performance, but ordinarily cannot sue for specific performance of the debtor's unperformed obligations. See *Bildisco & Bildisco*, 465 U.S. at 531-532.

Because the bankruptcy court generally reviews a trustee's choice to reject an executory contract under the deferential "business judgment" rule, it will ordinarily authorize rejection so long as the trustee has exercised sound business judgment. See *Bildisco & Bildisco*, 465 U.S. at 523. That standard gives the trustee broad leeway either to step into the debtor's shoes and perform the debtor's remaining obligations under a contract (thus maintaining in effect the counterparty's own contractual obligations, including future payment obligations), or to decline to assume those duties (thereby "releas[ing] the debtor's estate from burdensome obligations that can impede a successful reorganization"). *Id.* at 528. As this case comes to the Court, it is undisputed that (1) the Agreement is executory, because both parties had ongoing obligations to perform when the bankruptcy petition was filed; and (2) the bankruptcy court's approval of Tempnology's motion to "reject" the contract allowed Tempnology to stop its future performance, in which event Mission could file a pre-petition claim for any damages caused by that non-performance.

In articulating its business justification for rejecting the Agreement, however, Tempnology did not assert that performance of its remaining obligations under the Agreement would be burdensome to the estate. Rather, it "faulted Mission—and particularly the Agreement's grant of exclusive distribution rights—for its bankruptcy." Pet. App. 6a. Tempnology stated that Mission had stopped distributing Coolcore products, and that

Mission's inaction coupled with Mission's exclusive rights to distribute the products had "starv[ed]" Tempnology of income and "suffocated [its] ability to market and distribute its products." *Ibid.* Tempnology asserted that its rejection of the Agreement, if authorized by the court, would terminate the rights that Tempnology had already granted to Mission, including its exclusive-distribution rights and its license to use the Coolcore mark. See *ibid.* The basic question in this case is whether Tempnology's rejection of the Agreement actually had this effect.

b. In *Lubrizol Enterprises, Inc.* v. *Richmond Metal Finishers, Inc.*, 756 F.2d 1043 (1985), cert. denied, 475 U.S. 1057 (1986), the Fourth Circuit addressed a similar question in the context of patent licenses, holding that "rejection" under Section 365(a) of an executory contract empowered a patentholder to unilaterally revoke an existing patent license. *Id.* at 1045. The debtor in that case (RMF) had granted Lubrizol a nonexclusive license to use a patented process for coating metal. *Ibid.* RMF then filed for Chapter 11 bankruptcy and moved to reject the contract that had granted the license, with the aim of terminating the license itself and transforming Lubrizol from a licensee into an infringer. The court of appeals held that that the contract was executory; that the debtor's motion to reject it should be granted; and that rejection of the contract terminated Lubrizol's license to use the patent, thus relegating it to a damages claim against the estate. See *id.* at 1047-1048.

Congress subsequently amended Section 365 to abrogate *Lubrizol*. See Act of Oct. 18, 1988, Pub. L. No. 100-506, 102 Stat. 2538; S. Rep. No. 505, 100th Cong., 2d Sess. 3 (1988) (Senate Report) (describing *Lubrizol* as

"a fundamental threat to the creative process that has nurtured innovation in the United States"). Congress added to Section 365 a new subsection (n), which provides that, if the trustee rejects an executory contract "under which the debtor is a licensor of a right to intellectual property," the licensee "may elect" either:

> (A) to treat such contract as terminated * * * ; or
>
> (B) to retain its rights (including a right to enforce any exclusivity provision of such contract, but excluding any other right under applicable nonbankruptcy law to specific performance of such contract) under such contract * * * to such intellectual property.

11 U.S.C. 365(n)(1).

Under Section 365(n), the trustee cannot unilaterally terminate a license to use "intellectual property." Rather, if the trustee rejects an executory contract that granted such a license, the licensee can still choose to retain the license so long as it makes any royalty payments that are still due. 11 U.S.C. 365(n)(2)(B). Section 365(n) contains a definition of the term "intellectual property," and that definition does not encompass trademarks. 11 U.S.C. 101(35A).

The Senate Report explained that "the bill does not address the rejection of executory trademark" licenses, even though "such rejection is of concern because of the interpretation of section 365 by the *Lubrizol* court." Senate Report 5. The Report noted that trademark relationships "depend to a large extent on control of the quality of the products or services sold by the licensee." *Ibid.* Concluding that "these matters could not be addressed without more extensive study," the Committee "determined to postpone congressional action in this

area and to allow the development of equitable treatment of this situation by bankruptcy courts." *Ibid.* This case presents the question that Congress reserved when it enacted Section 365(n).

3. a. On October 2, 2015, the bankruptcy court granted Tempnology's motion to reject the Agreement, "subject to [Mission's] election to preserve its rights under 11 U.S.C. § 365(n)." Pet. App. 83a-84a. Tempnology then asked the court to determine what effect rejection had on Mission's continuing rights to use the Coolcore mark and to be the exclusive U.S. distributor of Coolcore clothing. See *id.* at 67a. The bankruptcy court issued an order declaring that Tempnology's rejection of the Agreement had terminated Mission's trademark license and its exclusive-distribution rights. *Id.* at 67a-68a; see *id.* at 77a-81a. Mission appealed but did not seek a stay, and the bankruptcy proceedings continued.

Mission then filed a claim against the estate for $4.16 million. J.A. 547-557. Mission's claim primarily asserted losses flowing from alleged breaches of Mission's exclusive distribution rights. J.A. 556-557. Mission stated that its damages were based on the assumption that its exclusive rights had been terminated, although it noted that it had appealed on that issue and that it reserved the right to amend its claim. J.A. 557 & n.4. It is unclear whether Mission's claim encompasses losses flowing from Mission's inability to use the Coolcore mark, or whether Mission was using the mark at the time the bankruptcy petition was filed.[2]

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[2] On December 18, 2015, the bankruptcy court approved the sale of substantially all of Tempnology's assets—including its intellectual property and distribution rights—for $2.7 million to Schleicher & Stebbins Hotels L.L.C. (S&S). J.A. 399, 411-412. Mission has sued S&S for damages, contending that S&S tortiously interfered

b. The Bankruptcy Appellate Panel (BAP) affirmed in part and reversed in part. Pet. App. 35a-65a. First, the BAP rejected Mission's argument that Section 365(n) protected its right to be the exclusive U.S. distributor of Coolcore clothing. *Id.* at 49a-51a. The BAP determined that exclusive-distribution rights do not constitute "intellectual property" as defined by 11 U.S.C. 101(35A), and that Section 365(n) therefore did not apply.

Second, the BAP held that Mission's license to use the Coolcore mark had survived rejection. Pet. App. 51a-60a. The BAP agreed with the bankruptcy court that Section 365(n) does not protect trademark licenses because the statutory definition of "intellectual property" does not encompass trademarks. *Id.* at 58a-59a. The BAP explained, however, that the inapplicability of Section 365(n) did not resolve the question because the outcome ultimately depended on "the consequences of rejection of an executory contract under § 365(g)." *Id.* at 59a. The BAP followed the Seventh Circuit's decision in *Sunbeam Products, Inc.* v. *Chicago American Manufacturing, LLC*, 686 F.3d 372 (Easterbrook, J.), cert. denied, 568 U.S. 1076 (2012), and held that "rejection" of an executory contract does not terminate a trademark license that has previously been granted. The court explained that, under that approach, "[t]he debtor's unfulfilled obligations are converted to damages," but "nothing about this process implies that any rights of the other contracting party have been vaporized." Pet. App. 60a (quoting *Sunbeam Products*, 686 F.3d at 377).

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with the Agreement, including by interfering with its exclusive-distribution rights. See 15-cv-9785, D. Ct. Doc. 1-2 (S.D.N.Y. Dec. 15, 2015). That suit has been stayed. See 15-cv-9785 Docket entry No. 19 (Feb. 11, 2016).

c. The court of appeals affirmed the bankruptcy court in full, disagreeing with the BAP's trademark ruling. Pet. App. 1a-28a. First, the court held that Mission's exclusive-distribution rights did not survive Tempnology's rejection of the Agreement. The court agreed with the BAP that Section 365(n) did not protect those rights, and it held that Mission had waived the argument that those rights survived rejection under Section 365(a) and (g). *Id.* at 12a-20a.

Second, the court of appeals held that Tempnology's rejection of the Agreement had terminated Mission's license to use the Coolcore mark. The court stated that it is not "possible to free a debtor from any continuing performance obligations under a trademark license even while preserving the licensee's right to use the trademark," because "the effective licensing of a trademark requires" that the owner "monitor and exercise control over the quality of goods sold to the public under cover of the trademark." Pet. App. 22a-23a. The court viewed the need for ongoing monitoring by the owner as distinguishing trademarks from patents, which Congress had addressed in Section 365(n). *Id.* at 23a. The court of appeals acknowledged that its holding was contrary to *Sunbeam Products* and to Judge Ambro's concurrence in *In re Exide Technologies*, 607 F.3d 957, 964-968 (3d Cir. 2010), cert. denied, 562 U.S. 1216 (2011). Pet. App. 22a.

Judge Torruella dissented in relevant part. Pet. App. 29a-34a. He largely agreed with the BAP's analysis, but, relying in part on the Senate Report, he further suggested that bankruptcy courts should apply equitable principles to determine the proper status of trademark licenses in bankruptcy. *Id.* at 32a-34a.

SUMMARY OF ARGUMENT

The statutory text, context, history, and purpose all support the Seventh Circuit's holding in *Sunbeam Products, Inc.* v. *Chicago American Manufacturing, LLC*, 686 F.3d 372, 377 (Easterbrook, J.), cert. denied, 568 U.S. 1076 (2012), that a trademark owner cannot revoke a trademark license by "reject[ing]" (11 U.S.C. 365(a)) in bankruptcy the contract under which that license was previously granted. The contrary decision of the court below should be reversed.

A. Outside bankruptcy, Tempnology could not have unilaterally revoked Mission's trademark license. Tempnology had already granted Mission a license to use the Coolcore mark that could not be terminated during the two-year wind-down period. In particular, Tempnology could not have revoked that license simply by refusing to perform its own obligations to monitor the mark. Halting its own performance might have made the license less valuable to Mission, but it would not have unwound the prior transfer of the right to use the mark or made the right revocable during the wind-down period. If a landlord has rented a family an apartment and has agreed to pay the utilities, the landlord cannot later terminate the family's lease simply by refusing to pay the cable bill. The same principle applies to agreements that authorize the use of intellectual property.

B. A trademark owner does not gain power to revoke a trademark license that it could not revoke outside bankruptcy, simply by filing for bankruptcy and then "reject[ing]" the contract under which that license had previously been granted. Under the Bankruptcy Code, the trustee's "reject[ion]" of an "executory contract"—*i.e.*, a contract under which both parties have remaining

performance obligations—simply means that the trustee has refused to assume those obligations and has halted its own performance. 11 U.S.C. 365(a). Although such non-performance "constitutes a breach of the contract," 11 U.S.C. 365(g), it does not rescind the debtor's pre-bankruptcy grant of a trademark license.

C. Congress's enactment of 11 U.S.C. 365(n) does not undermine that conclusion. Section 365(n) makes clear that, once an owner has granted a license to use a patent or certain other listed kinds of "intellectual property," the owner cannot unilaterally terminate the license through "rejection" of the contract under which the license was previously granted. Congress adopted subsection (n) to abrogate the Fourth Circuit's holding in *Lubrizol Enterprises, Inc.* v. *Richmond Metal Finishers, Inc.*, 756 F.2d 1043 (1985), cert. denied, 475 U.S. 1057 (1986), that the owner of a patent could unilaterally terminate a patent license by "rejecting" the contract under which the license had been granted.

Because the applicable definition of "intellectual property" does not encompass trademarks, see 11 U.S.C. 101(35A), a trademark licensee cannot invoke Section 365(n)'s protections. The omission of trademarks from Section 365(n)'s coverage does not suggest, however, that Congress intended the *Lubrizol* rule to control in the trademark context. Rather, questions concerning the legal effect of a trustee's rejection of a pre-bankruptcy contract granting a trademark license continue to be governed by Section 365(a) and (g). Under those provisions, as the Seventh Circuit correctly held in *Sunbeam Products*, rejection enables the trustee not to take on the debtor's own obligations under such a contract, but it does not divest the debtor's counterparty of its right to use the licensed trademark.

ARGUMENT

SECTION 365 DOES NOT EMPOWER A BANKRUPT TRADEMARK OWNER TO REVOKE A TRADEMARK LICENSE THAT IT COULD NOT HAVE REVOKED OUTSIDE BANKRUPTCY

A. Outside Bankruptcy, Tempnology Could Not Have Revoked Mission's Trademark License

The day before it entered bankruptcy, Tempnology could not have unilaterally revoked Mission's license to use the "Coolcore" mark. Tempnology had already granted Mission a license to use that mark; the Agreement mandated a two-year wind-down period before termination could occur absent a material breach by the other party; and there was no such breach here. See Pet. App. 4a-5a. Mission's license was thus irrevocable during the wind-down period, which was ongoing when Tempnology filed its bankruptcy petition. Accordingly, if Tempnology had purported to revoke the license outside of bankruptcy, and had alleged that Mission's continued use of the trademark would constitute infringement, Mission could have prevailed in any infringement suit on the ground that its use was authorized by the license and therefore was not infringing.

In addition to granting Mission a license, the Agreement imposed continuing obligations on Tempnology, which the court of appeals appeared to understand to include a duty to monitor and control the quality of Coolcore-branded goods. Pet. App. 4a, 23a-24a; see p. 3, *supra*. If Tempnology had ceased performing those functions outside of bankruptcy, consumers might have become "deceived" because the trademark might no longer have signified "that the trademark owner is controlling the nature and quality of the goods or services sold under the mark," undermining the value of the

Coolcore brand. 3 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 18:48, at 126-127 (5th ed. 2018) (McCarthy). In response, Mission might have sued Tempnology for (1) money damages for losses caused by Tempnology's non-performance; or (2) an order for specific performance, if damages were inadequate and such relief was otherwise available. See Restatement (Second) of Contracts §§ 345, 357, 359 (1981); 25 Samuel Williston & Richard A. Lord, *A Treatise on the Law of Contracts* § 67:32, at 292-294 (4th ed. 2002).

If Tempnology's non-performance were material, Mission also could have chosen to terminate the agreement and halted its own performance. See Restatement (Second) of Contracts § 237; see also Pet. App. 106a-108a. Nothing in the law of contracts, however, would have compelled Mission to make that choice if it believed that its license retained value notwithstanding Tempnology's failure to perform its own obligations. Nor could Tempnology have effectively imposed that choice on Mission by declaring the license terminated based on Tempnology's own breach. See *Sunbeam Products, Inc.* v. *Chicago Am. Mfg., LLC*, 686 F.3d 372, 376 (7th Cir.) ("Outside of bankruptcy, a licensor's breach does not terminate a licensee's right to use intellectual property.") cert. denied, 568 U.S. 1076 (2012); *In re Exide Techs.*, 607 F.3d 957, 967-968 (3d Cir. 2010) (Ambro, J., concurring), cert. denied, 562 U.S. 1216 (2011).[3]

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[3] Tempnology also could not have barred Mission from using the Coolcore mark by entirely abandoning the mark and causing it to "lose its significance as a mark." 15 U.S.C. 1127; see McCarthy § 18:48, at 133. Abandonment returns the mark to "the public do-

This principle is fundamental, and examples of it are legion. If a dealer sells a car and agrees in the same contract to provide routine maintenance, the dealer would breach that contract if it subsequently refused to change the oil, thus triggering a potential suit for damages or specific performance. But the dealer's refusal to change the oil would not revoke the buyer's ownership of the car. Similarly, if a law firm leases a photocopier and the dealer agrees in that contract to service it every month, the dealer could not unilaterally revoke the law firm's rights to use the copier simply by refusing to appear for a service appointment. And if a landlord rents an apartment to a family and agrees in the contract to pay the utilities, the landlord could not revoke the family's lease simply by refusing to pay the cable bill. Rather, the family would retain its right to live in the apartment so long as they paid the rent.

B. Section 365(a) Does Not Empower A Bankrupt Trademark Owner To Revoke A Trademark License It Could Not Revoke Outside Bankruptcy

Section 365(a) does not break from this basic principle of the stability of contracts. Section 365(a) codifies a preexisting rule that a trustee ordinarily may decline to take on ("reject") the debtor's remaining contractual obligations if the trustee concludes that continued performance would be detrimental to the estate and its creditors. But the owner of a trademark who enters Chapter 11 bankruptcy cannot revoke a trademark li-

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main," making it "free for all to use." McCarthy § 17:1, at 2-3. Mission's right to use the mark during the wind-down period was thus secure from revocation by Tempnology outside bankruptcy.

cense that it could not have revoked outside bankruptcy, simply by "rejecting" the contract under which that license was granted.

1. Under Section 365(a) and (g), the Chapter 11 trustee may decline to undertake the debtor's future performance obligations under an executory contract

a. Section 365(a) provides that the "trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor." 11 U.S.C. 365(a). The "trustee" is the entity that administers the bankruptcy estate, see 11 U.S.C. 323, and the "debtor" is the bankrupt individual or business. In ordinary speech, "assume" means "to take up or into," "to take upon oneself," or "to take over as one's own." *Webster's Third New International Dictionary* 133 (2002). "Reject" means "to refuse to acknowledge [or] adopt," "decline to accept," or "to refuse * * * to take for some purpose." *Id.* at 1915. And a contract is "executory" if "performance remains due to some extent on both sides." *NLRB* v. *Bildisco & Bildisco*, 465 U.S. 513, 522 n.6 (1984) (quoting H.R. Rep. No. 595, 95th Cong., 1st Sess. 347 (1977)); see *Black's Law Dictionary* 393 (10th ed. 2014) (contract is "executory" where "there remains something still to be done on both sides").

The trustee accordingly "assumes" a contract under which the debtor has remaining performance obligations when the trustee agrees to take upon itself the debtor's remaining obligations and thus performs them. The trustee "rejects" such a contract when the trustee instead refuses to take on the debtor's obligations and accordingly does not perform them. Section 365(g) confirms this understanding by specifying that rejection of an executory contract or unexpired lease "constitutes a breach of such contract or lease." 11 U.S.C. 365(g).

Section 365 makes clear that the trustee can elect not to complete the debtor's remaining contractual performance obligations, if performance has become uneconomical and thus would be harmful to the estate and other creditors. See *Enterprise Energy Corp.* v. *United States*, 50 F.3d 233, 239 n.8 (3d Cir. 1995) ("Rejection, which is appropriate when a contract is a liability to the bankrupt, is equivalent to a nonbankruptcy breach.").

Taken together, Section 365(a) and (g) thus establish that a trustee's choice not to take on the debtor's future performance obligations constitutes a breach of the contract, even though the trustee was not originally a party to the contract and thus may not have "breached" it under ordinary contract principles. "[B]y classifying rejection as breach," Section 365(g) thus *protects* counterparties by establishing that "in bankruptcy, as outside of it, the other party's rights remain in place." *Sunbeam Products*, 686 F.3d at 377. In particular, if the trustee chooses to reject a contract, the counterparty can assert a pre-petition claim for damages against the estate. See Michael T. Andrew, *Executory Contracts in Bankruptcy: Understanding 'Rejection'*, 59 U. Colo. L. Rev. 845, 877 (1988) (Andrew) ("The 'breach' rule thus is not in any sense designed to diminish the nondebtor's rights vis-a-vis *the estate*, but rather to buttress them."). Section 365(a) and (g) ensure that the trustee can halt burdensome contractual performance obligations, leaving the counterparty with a pre-petition claim for damages.

b. Nothing in Section 365, however, empowers a trustee to revoke the grant of a trademark license that the debtor already granted and could not revoke under the terms of the parties' original agreement. "Rejection" does not "render[] void the contract and requir[e]

that the parties be put back in the positions they occupied before the contract was formed." *Thompkins* v. *Lil' Joe Records, Inc.*, 476 F.3d 1294, 1306 (11th Cir.), cert. denied, 552 U.S. 1022 (2007); see *O'Neill* v. *Continental Airlines, Inc.*, 981 F.2d 1450, 1459 (5th Cir. 1993) ("To assert that a contract effectively does not exist as of the date of rejection is inconsistent with deeming the same contract breached."). *Rejection* is thus different from *rescission*, which typically allows a counterparty to halt its own performance and terminate a contract in response to a repudiation or material breach by the other party. See 26 Samuel Williston & Richard A. Lord, *A Treatise on the Law of Contracts* § 68.2, at 37-42 (4th ed. 2003).

For example, in the photocopier scenario described above (see p. 15, *supra*), if the dealer entered bankruptcy, the trustee could "assume or reject" the contract by deciding whether to take upon itself the obligation to provide free monthly servicing. The trustee's power to reject the contract, however, would not include the power to repossess the copier before the lease term expired. The same principle applies to trademark licenses. When the owner of a mark has granted a license to use that mark and the owner later enters bankruptcy, the trustee can "assume or reject"—decide whether to take upon itself—the owner's remaining obligations under the contract. Those obligations may include monitoring and quality control to protect consumers' expectations about the licensed goods or services. But the trustee's power to "reject" the contract, and thus to decline to take on the debtor's remaining obligations under the agreement, does not include the power to revoke a license that the debtor previously granted and could not revoke outside bankruptcy.

Congress's decision to limit the trustee's rejection authority to "executory" contracts reinforces that conclusion. Congress did not give trustees the substantially broader power to unwind contractual undertakings that have already been completed. Under the court of appeals' approach, however, the trustee could undo a contractually-required act that the debtor had fully performed pre-bankruptcy, simply because of the happenstance that some *other* term of the contract had yet to be performed when the bankruptcy petition was filed. Nothing in Section 365 suggests that Congress intended the haphazard results that such a regime would produce.

2. The court of appeals' understanding of "rejection" would undermine the statutory limitations on "avoidance" of pre-bankruptcy transfers

a. In certain limited circumstances, the Bankruptcy Code authorizes trustees to unwind completed transfers from debtors to third parties. That power is not conferred by Section 365, however, and it does not encompass Tempnology's revocation of the trademark license at issue here.

In 11 U.S.C. 544-553, as part of a subchapter titled "The Estate," the Bankruptcy Code vests the trustee with "avoiding powers" to "'set aside certain types of transfers and recapture the value of those avoided transfers for the benefit of the estate.'" *Merit Mgmt. Grp., LP* v. *FTI Consulting, Inc.*, 138 S. Ct. 883, 888 (2018) (quoting Charles Jordan Tabb, *Law of Bankruptcy* § 6.2, at 474 (4th ed. 2016)) (brackets and ellipses omitted). For example, the trustee may "avoid" a fraudulent transfer of property or an interest in property from the debtor to a creditor in the run-up to bankruptcy. 11 U.S.C. 548(a). By "avoiding" a transfer, the

trustee (subject to various exceptions) may "recover, for the benefit of the estate, the property transferred" from the transferee. 11 U.S.C. 550(a). The avoidance power is thus a means by which the trustee may unwind a pre-petition transfer and recapture the transferred property for the estate.

Congress has carefully cabined the trustee's avoidance powers, however, by imposing "a number of limits" that constrain its use to a "limited category" of circumstances. *Merit Mgmt.*, 138 S. Ct. at 887, 889. To unwind a fraudulent transfer, the trustee must establish that the transfer was actually or constructively fraudulent, 11 U.S.C. 548(a)(1)(A)-(B), and that the transfer occurred within a specified period of time before the bankruptcy, 11 U.S.C. 546(a). See also 11 U.S.C. 546(b)-(j) (additional limitations applicable in certain cases). The trustee thus cannot use "avoidance" to revoke a trademark license simply because the estate would benefit financially by selling the license a second time.

b. The court of appeals' understanding of "rejection" would allow trustees to circumvent the Bankruptcy Code's limitations on the avoidance power. Under the court of appeals' approach, the only practical difference between "avoidance" and "rejection" of a trademark license is that "rejection" would allow the licensee to file a prepetition claim for damages while avoidance would not. But unlike the trustee's "avoidance" powers, which are tightly cabined, the trustee has broad authority to "reject" an executory contract. The choice is discretionary, see 11 U.S.C. 365(a) ("may assume or reject"), and the bankruptcy court ordinarily reviews the trustee's choice under the deferential "business judgment" rule, *Bildisco & Bildisco*, 465 U.S. at 523. The trustee will be able to satisfy that standard whenever it concludes

that the ability to offer a trademark license to a new licensee is worth more to the estate than whatever payments remain due from the incumbent under the terms of the original contract. It would subvert the statutory scheme to allow the trustee to undertake the functional equivalent of avoidance without satisfying the stringent standards that the Bankruptcy Code places on overt exercises of the avoidance power.[4]

3. *The statute's history supports the Seventh Circuit's decision in* Sunbeam Products

Section 365(a) codifies a preexisting common-law rule under which a bankruptcy trustee (formerly called an "assignee") did not automatically take on the debtor's ongoing contractual obligations, but instead could "accept or refuse" to perform them. See Andrew 855-866 (detailing this history); see also *Copeland* v. *Stephens*, 106 Eng. Rep. 218, 222 (K.B. 1818). More than a century ago, this Court described it as a "general rule" that "an assignee or receiver is not bound to adopt the contracts, accept the leases, or otherwise step into the shoes of [the debtor], if, in his opinion, it would be unprofitable or undesirable to do so." *United States Trust Co.* v. *Wabash W. Ry. Co.*, 150 U.S. 287, 299 (1893); see *Sparhawk* v. *Yerkes*, 142 U.S. 1, 13 (1891) (assignees "could elect whether they would accept or not"); *Watson*

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[4] The Federal Rules of Bankruptcy Procedure also impose more stringent procedures in avoidance actions. Avoidance requires an adversary proceeding, akin to a "full-blown federal lawsuit[]," whereas rejection is typically resolved as a contested matter, "generally designed for adjudication of simple issues, often on an expedited basis." *In re TransAmerican Natural Gas Corp.*, 978 F.2d 1409, 1416 (5th Cir. 1992); see Fed. R. Bankr. P. 7001 advisory committee's note (adversary proceedings are used in proceedings "brought to avoid transfers by the debtor").

v. *Merrill*, 136 F. 359, 363 (8th Cir. 1905) (trustee may "assume or renounce" the debtor's "executory contracts); *In re Frazin*, 183 F. 28, 30, 32 (2d Cir. 1910) (trustee may "assume or reject" an unexpired lease for which the debtor was the lessee). These decisions made clear that the trustee could decline to take on the debtor's remaining performance obligations under an executory contract or unexpired lease.

In *Sparhwark*, for example, the Court explained that bankruptcy assignees could elect not to assume the debtor's obligation to pay "annual dues and charges" and take other steps needed to maintain a valid seat on the board of a stock exchange. 142 U.S. at 12-14; see *Watson*, 136 F.3d at 363 (trustee for bankrupt tenant could decline to take on a lease with a burdensome future rent). Although the issue did not often arise, courts had also held that a trustee for a bankrupt landlord could decline to take on the landlord's burdensome future performance obligations, but could not terminate the tenant's lease itself. In *Vass* v. *Conron Brothers Co.*, 59 F.2d 969 (2d Cir. 1932) (L. Hand, J.), for example, a landlord had rented out a space to a cold storage plant and had "agreed to refrigerate" the space. *Ibid.* When the landlord later entered bankruptcy, the court held that the trustee could decline to take on the obligation to refrigerate the space, but "could not eject" the tenants. *Id.* at 971; see *American Brake Shoe & Foundry Co.* v. *New York Rys. Co.*, 278 F. 842, 843-844 (S.D.N.Y. 1922) (receiver of a bankrupt landlord "might refuse to carry out" "executory covenants as to furnishing heat, electric current, etc.," but could not "commence any proceeding to evict or eject the tenant").

In 1938, Congress codified the "assume or reject" authority by directing that "the trustee shall assume or

reject any executory contract, including unexpired leases of real property," within 60 days, and that "the rejection" of such a contract "shall constitute a breach." Act of June 22, 1938, ch. 575, §§ 63c, 70b, 52 Stat. 873, 880; see Andrew 861 n.75. The text remains materially identical today. This historical backdrop strongly supports the *Sunbeam Products* court's understanding that the trustee may "reject," and thus decide not to fulfill, the debtor's ongoing performance obligations. But it provides no support for treating the trustee's authority to "reject" an executory contract as a far-reaching power to revoke a license that the debtor previously granted and could not revoke outside bankruptcy.[5]

4. The court of appeals' concerns were misplaced

In construing Section 365 to authorize the revocation of Mission's trademark license, the court of appeals observed that trademark licenses are different from other kinds of intellectual-property licenses because "the effective licensing of a trademark requires that the trademark owner * * * monitor and exercise control over the quality of the goods sold to the public under cover of the trademark," so that trademarks will "signal uniform

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[5] The leading bankruptcy commentators support the *Sunbeam Products* rule. See 3 *Collier on Bankruptcy* ¶ 365.10[3], at 83 (Richard Levin & Henry J. Sommer, eds., 16th ed. 2017) ("The effect of rejection of an executory contract or unexpired lease is limited to a breach or abandonment by the trustee or debtor in possession rather than a complete termination of the lease."); Robert E. Ginsberg et al., *Ginsberg & Martin on Bankruptcy* § 7.03[C], at 53 (5th ed. 2018) ("Rejection does not terminate or rescind the contract; rather, it is a statutory breach."); 2 William L. Norton III, *Norton Bankruptcy Law and Practice* § 46.24, at 108-109 (3d ed. 2018) ("[R]ejection of an executory contract does not cause the contract to vanish or become a nullity"; it "is not avoidance, rescission, or termination.").

quality" to consumers. Pet. App. 23a. The court explained that "[t]he licensor's monitoring and control thus serve to ensure that the public is not deceived as to the nature or quality of the goods sold." *Ibid.*; see McCarthy § 18:48, at 126-127. The court concluded that leaving Mission's license intact would "force" Tempnology "to choose between performing executory obligations" and "risking the permanent loss of its trademarks." Pet. App. 24a. To ensure that Tempnology was not put to that choice, the court construed Section 365(a)'s authorization to "reject" the contract as encompassing the power to terminate the license, even though Tempnology could not have terminated it outside bankruptcy.

The court of appeals' premise is correct, so far as it goes, but its conclusion does not follow. As a condition of continuing trademark protection, a trademark owner must engage in ongoing efforts to exercise quality control over the goods associated with the mark, in order to avoid upsetting consumer expectations about the level of quality associated with the mark, and to ensure that the entity that controls the use of the mark is the owner. This obligation remains in effect even if the trademark owner has licensed another to use its mark. See p. 13, *supra*; Senate Report 5 ("[T]rademark, trade name and service mark licensing relationships depend to a large extent on control of the quality of the products or services sold by the licensee."). The recognition that this obligation exists, however, does not support the court of appeals' conclusion as to the consequences of a breach. If a trademark owner stops maintaining the mark, the value of the mark (and thus of any license to use it) may decrease over time. See *Defiance Button Mach. Co.* v. *C & C Metal Prods. Corp.*, 759 F.2d 1053,

1060 (2d Cir.) (goodwill associated with a mark "does not ordinarily disappear or completely lose its value overnight"), cert. denied, 474 U.S. 844 (1985). But inside or outside bankruptcy, the licensor's failure to perform its own responsibilities does not revoke the existing license.

In this regard, trademark licensing resembles the car, photocopier, and apartment examples discussed above, in which the failure of a seller or lessor to perform its ongoing maintenance obligations may reduce the value of the counterparty's rights and interests. If that diminution is severe enough, the counterparty may be entitled as a matter of contract law to discontinue its own performance, renounce the agreement, return the sold or leased property, and potentially unwind other terms of the contract. But the seller or lessor cannot *compel* that result simply by committing its own breach. There is no sound basis for giving a trustee's rejection of a trademarks-licensing contract a more far-reaching effect than an analogous breach would have outside bankruptcy.

The rule announced in *Sunbeam Products* thus does not impose "residual enforcement burden[s]" on a debtor who has previously granted a license of its trademark. Pet. App. 27a. As with other "executory burdens," *ibid.*, the trustee by rejecting the contract may decline to take on contractual obligations to conduct quality control or the like. But the decision whether the mark is still worth using during the remaining term of the license is the *licensee's* to make, because the trustee's rejection of the contract does not rescind the license that the debtor previously granted.

5. The court of appeals' rule would undermine strong reliance interests

The court of appeals' interpretation of Section 365 would upset the "delicate balance of a debtor's protections and obligations" in bankruptcy. *Midland Funding, LLC* v. *Johnson*, 137 S. Ct. 1407, 1415 (2017) (quoting *Kokoszka* v. *Belford*, 417 U.S. 642, 651 (1974)). In particular, it would "make[] bankruptcy more a sword than a shield, putting debtor-licensors in a catbird seat they often do not deserve," *In re Exide Techs.*, 607 F.3d at 967-968 (Ambro, J., concurring), and divesting counterparties of valuable rights—licenses to use trademarks—that they have already bought from debtors.

Termination of a trademark license can significantly disrupt a licensee's strong reliance interests. Because it is unclear whether Mission was using the Coolcore mark at the time of Tempnology's bankruptcy, it is unclear whether termination had a significant impact on Mission's financial condition. In many cases, however, termination of trademark licenses will be profoundly disruptive because businesses often invest substantial resources in reliance on such licenses.

For example, an individual who opens a local franchise of a chain restaurant ("BurgerTown") may invest significant resources buying "BurgerTown" branded signs, furniture, menus, uniforms, franchisor-approved cooking equipment, and the like. Under the court of appeals' approach, however, if the corporate owner of the BurgerTown mark entered Chapter 11 bankruptcy to reorganize any aspect of its business (even one separate from the BurgerTown chain), it could immediately revoke the franchisee's license, effectively forcing the individual to negotiate a second license in order to continue its operations. That rule would give the trustee or

debtor in possession extraordinary and unwarranted leverage over a particular class of creditors. The court of appeals' approach also would create significant economic disincentives for would-be licensees to acquire trademark licenses in the first place, particularly if the potential licensor was perceived to be in perilous financial condition.

Furthermore, although the court of appeals' holding is specific to trademark licenses, its rationale is not. The court's reasoning instead depends on its interpretation of Section 365(a) and (g), which apply to executory contracts generally. See Pet. App. 20a-27a. As discussed above, analogous situations can arise in many other contexts where an entity has granted an interest in property but is contractually required to perform ongoing maintenance responsibilities. See p. 15, *supra* (collecting examples). A rule treating the trustee's power to "reject" such contracts as encompassing the power to repossess the property or otherwise negate the counterparty's rights and interests in it could have broad and deleterious consequences. To be sure, Section 365 contains certain safe harbors to protect specific classes of counterparties from disruption. See, *e.g.*, 11 U.S.C. 365(h) (protecting tenants in the event of the bankruptcy of the lessor); pp. 28-31, *infra* (discussing Section 365(n)). But those safe harbors are not intended to be comprehensive, and similar risks could arise in other contexts. The *Sunbeam Products* rule avoids these problems.

C. Neither Congress's Enactment Of Section 365(n), Nor Its Omission Of Trademarks From The Applicable Definition Of "Intellectual Property," Supports The Court Of Appeals' Decision In This Case

1. In *Lubrizol Enterprises, Inc.* v. *Richmond Metal Finishers, Inc.*, 756 F.2d 1043 (1985), cert. denied, 475 U.S. 1057 (1986), the Fourth Circuit adopted an approach to rejection of patent licenses that was substantially similar to the trademark-licensing rule announced by the First Circuit in this case. The *Lubrizol* court held that the patentholder-debtor's rejection of an executory contract empowered the debtor to revoke a patent license that it had granted pre-bankruptcy. See *id.* at 1045-1048. Congress responded to *Lubrizol* by enacting Section 365(n). That provision states that, if a trustee rejects an executory contract that granted an "intellectual property" license, the licensee may elect to retain its rights (including any exclusive rights), subject to specified conditions. 11 U.S.C. 365(n). Congress defined the term "intellectual property" to mean patents, copyrights, and four other listed kinds of intellectual property. 11 U.S.C. 101(35A).

Because the enumerated categories of "intellectual property" do not include trademarks, the scope of Tempnology's power to "reject" the Agreement, and the legal consequences of its decision to do so, are controlled by statutory provisions *other than* Section 365(n). See Senate Report 5 (explaining that the bill that included Section 365(n) "does not address the rejection of executory trademark" licenses). In particular, Congress's decision to omit trademarks from Section 101(35A)'s definition of "intellectual property" means that the question presented here continues to be governed by Section 365(a) and (g). For the reasons set forth above, those

provisions empower Tempnology to cease performing its own obligations under the Agreement, but not to rescind the trademark license that it had previously granted. If that reading of Section 365(a) and (g) is otherwise persuasive, Congress's decision to mandate an analogous approach for patent licenses provides no sound reason to reject it.

To be sure, Congress could have unambiguously discountenanced the approach that the First Circuit took in this case by including trademarks within the categories of "intellectual property" enumerated in the statute. But Congress's failure to take that step in 1988 does not imply any particular view as to the legal consequences that rejection of a trademark-licensing agreement should entail. It is worth noting, in this regard, that Section 365(n) establishes a reticulated scheme that addresses patent licenses at a greater level of detail than does the generally worded language of Section 365(a) and (g). Congress's unwillingness to subject trademark licenses to that specific scheme does not suggest disagreement with the general principle that a trademark license survives the trustee's rejection of an executory contract under which the license was previously granted.

2. *Lubrizol* itself involved a debtor's rejection of a patent- rather than a trademark-licensing agreement. By enacting Section 365(n), Congress overruled the holding in *Lubrizol* in the specific intellectual-property context in which that case arose. It would be particularly strange to treat that congressional action as implicitly *ratifying* the *Lubrizol* court's rationale in the trademark context.

The Senate Report accompanying Section 365(n) identified *Lubrizol* as a "recent court decision[] interpreting Section 365 [that] imposed a burden on American technological development" and "threaten[ed] the very flexible and beneficial system of intellectual property licensing which has developed in the United States." Senate Report 1, 3. The Report further stated that the bill was "intended to respond to a particular problem arising out of recent court decisions," and to "correct[] the perception of some courts that Section 365 was ever intended to be a mechanism for stripping innocent licensee of rights central to the operations of their ongoing business." *Id.* at 4-5.

The Report also stated that the bill was "not in any way intended to address broader matters under Section 365," and in particular that it "d[id] not address the rejection of executory trademark" licenses. Senate Report 5. The Report explained that trademarks were "beyond the scope of this legislation," and that the Committee had "determined to postpone congressional action in [the trademark] area and to allow the development of equitable treatment of this situation by bankruptcy courts," because the Committee viewed trademarks as presenting somewhat different policy concerns. *Ibid.*[6] Section 365(n)'s legislative history is thus

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[6] The Senate Report suggested that bankruptcy courts could apply equitable principles to determine the consequences of rejecting an executory contract that had previously granted a trademark license. Senate Report 5; see Pet. App. 32a-34a (Torruella, J., dissenting in part). But bankruptcy courts' equitable powers "'must and can only be exercised within the confines of' the Bankruptcy Code." *Law* v. *Siegel*, 571 U.S. 415, 421 (2014) (citation omitted). For the reasons set forth above, bankruptcy courts lack the authority to revoke a trademark license based on the trustee's "rejection" of an executory contract, because the license has already been

consistent with the Seventh Circuit's subsequent observation in *Sunbeam Products* that sometimes "an omission is just an omission." 686 F.3d at 375. In enacting Section 365(n), Congress responded to a specific problem (*Lubrizol*'s threat to patent licensees) with a targeted solution that eliminated that threat, while leaving related questions to be dealt with under more general pre-existing Code provisions.

Congress thus did not implicitly ratify *Lubrizol*'s reasoning and extend it to trademarks by expressly rejecting *Lubrizol*'s result as to patents. In omitting trademarks from the applicable definition of "intellectual property" (and thus from Section 365(n)'s coverage), Congress instead left to the courts the task of deciding how trademark licenses should be treated under Section 365(a) and (g). For the reasons set forth above, this Court should hold that a debtor cannot use "rejection" to revoke a trademark license that the debtor has already granted and that it could not revoke outside bankruptcy.

D. This Court Should Not Decide In The First Instance What Effect Rejection Of The Agreement Had On Mission's Exclusive-Distribution Rights

This Court granted review on the first question presented in the certiorari petition, which extends beyond Mission's trademark license to encompass the related argument that Mission's right to be the exclusive U.S. distributor of Coolcore clothing survived Tempnology's "rejection" of the Agreement under Section 365(a) and (g). See Pet. i. This Court should not resolve any exclusive-distribution issue in the first instance.

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granted and cannot be revoked simply by the trustee declining to take on the contract and its future performance obligations.

The court of appeals' only holding regarding Section 365(a) and (g) was that Tempnology's rejection of the Agreement terminated Mission's trademark license. Pet. App. 20a-27a. The conflict between that holding and the Seventh Circuit's decision in *Sunbeam Products* is specific to trademarks. The First Circuit declined to review the bankruptcy court's holding that Tempnology's rejection of the Agreement under Section 365(a) and (g) had terminated Mission's exclusive-distribution rights, because the court of appeals determined that Mission had failed to preserve its contrary argument below. See *id.* at 19a-20a.[7]

This Court is "a court of review, not of first view." *Nautilus, Inc.* v. *Biosig Instruments, Inc.*, 572 U.S. 898, 913 (2014) (citation omitted). The Court accordingly should adopt the *Sunbeam Products* rule and reverse. On remand, the court of appeals can decide in the first instance whether to reconsider its preservation decision and, if so, whether exclusive-distribution rights can be terminated via "rejection" under Section 365(a) and (g).

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[7] The court of appeals held that Section 365(n) itself did not protect Mission's exclusive-distribution rights. Pet. App. 12a-19a. This Court did not grant certiorari on that question.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

1. 11 U.S.C. 365 provides:

Executory contracts and unexpired leases

(a) Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.

(b)(1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee—

(A) cures, or provides adequate assurance that the trustee will promptly cure, such default other than a default that is a breach of a provision relating to the satisfaction of any provision (other than a penalty rate or penalty provision) relating to a default arising from any failure to perform nonmonetary obligations under an unexpired lease of real property, if it is impossible for the trustee to cure such default by performing nonmonetary acts at and after the time of assumption, except that if such default arises from a failure to operate in accordance with a nonresidential real property lease, then such default shall be cured by performance at and after the time of assumption in accordance with such lease, and pecuniary losses resulting from such default shall be compensated in accordance with the provisions of this paragraph;

(B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and

(C) provides adequate assurance of future performance under such contract or lease.

(2) Paragraph (1) of this subsection does not apply to a default that is a breach of a provision relating to—

(A) the insolvency or financial condition of the debtor at any time before the closing of the case;

(B) the commencement of a case under this title;

(C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement; or

(D) the satisfaction of any penalty rate or penalty provision relating to a default arising from any failure by the debtor to perform nonmonetary obligations under the executory contract or unexpired lease.

(3) For the purposes of paragraph (1) of this subsection and paragraph (2)(B) of subsection (f), adequate assurance of future performance of a lease of real property in a shopping center includes adequate assurance—

(A) of the source of rent and other consideration due under such lease, and in the case of an assignment, that the financial condition and operating performance of the proposed assignee and its guarantors, if any, shall be similar to the financial condi-

tion and operating performance of the debtor and its guarantors, if any, as of the time the debtor became the lessee under the lease;

(B) that any percentage rent due under such lease will not decline substantially;

(C) that assumption or assignment of such lease is subject to all the provisions thereof, including (but not limited to) provisions such as a radius, location, use, or exclusivity provision, and will not breach any such provision contained in any other lease, financing agreement, or master agreement relating to such shopping center; and

(D) that assumption or assignment of such lease will not disrupt any tenant mix or balance in such shopping center.

(4) Notwithstanding any other provision of this section, if there has been a default in an unexpired lease of the debtor, other than a default of a kind specified in paragraph (2) of this subsection, the trustee may not require a lessor to provide services or supplies incidental to such lease before assumption of such lease unless the lessor is compensated under the terms of such lease for any services and supplies provided under such lease before assumption of such lease.

(c) The trustee may not assume or assign any executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if—

(1)(A) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and

(B) such party does not consent to such assumption or assignment; or

(2) such contract is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor, or to issue a security of the debtor; or

(3) such lease is of nonresidential real property and has been terminated under applicable nonbankruptcy law prior to the order for relief.

(d)(1) In a case under chapter 7 of this title, if the trustee does not assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor within 60 days after the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such contract or lease is deemed rejected.

(2) In a case under chapter 9, 11, 12, or 13 of this title, the trustee may assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor at any time before the confirmation of a plan but the court, on the request of any party to such contract or lease, may order the trustee to determine within a specified period of time whether to assume or reject such contract or lease.

(3) The trustee shall timely perform all the obligations of the debtor, except those specified in section 365(b)(2), arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected, notwithstanding section 503(b)(1) of this title. The court may extend, for cause, the time for performance of any such obligation that arises within 60 days after the date of the order for relief, but the time for performance shall not be extended beyond such 60-day period. This subsection shall not be deemed to affect the trustee's obligations under the provisions of subsection (b) or (f) of this section. Acceptance of any such performance does not constitute waiver or relinquishment of the lessor's rights under such lease or under this title.

(4)(A) Subject to subparagraph (B), an unexpired lease of nonresidential real property under which the debtor is the lessee shall be deemed rejected, and the trustee shall immediately surrender that nonresidential real property to the lessor, if the trustee does not assume or reject the unexpired lease by the earlier of—

(i) the date that is 120 days after the date of the order for relief; or

(ii) the date of the entry of an order confirming a plan.

(B)(i) The court may extend the period determined under subparagraph (A), prior to the expiration of the 120-day period, for 90 days on the motion of the trustee or lessor for cause.

(ii) If the court grants an extension under clause (i), the court may grant a subsequent extension only upon prior written consent of the lessor in each instance.

(5) The trustee shall timely perform all of the obligations of the debtor, except those specified in section 365(b)(2), first arising from or after 60 days after the order for relief in a case under chapter 11 of this title under an unexpired lease of personal property (other than personal property leased to an individual primarily for personal, family, or household purposes), until such lease is assumed or rejected notwithstanding section 503(b)(1) of this title, unless the court, after notice and a hearing and based on the equities of the case, orders otherwise with respect to the obligations or timely performance thereof. This subsection shall not be deemed to affect the trustee's obligations under the provisions of subsection (b) or (f). Acceptance of any such performance does not constitute waiver or relinquishment of the lessor's rights under such lease or under this title.

(e)(1) Notwithstanding a provision in an executory contract or unexpired lease, or in applicable law, an executory contract or unexpired lease of the debtor may not be terminated or modified, and any right or obligation under such contract or lease may not be terminated or modified, at any time after the commencement of the case solely because of a provision in such contract or lease that is conditioned on—

(A) the insolvency or financial condition of the debtor at any time before the closing of the case;

(B) the commencement of a case under this title; or

(C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement.

(2) Paragraph (1) of this subsection does not apply to an executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if—

(A)(i) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to the trustee or to an assignee of such contract or lease, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and

(ii) such party does not consent to such assumption or assignment; or

(B) such contract is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor, or to issue a security of the debtor.

(f)(1) Except as provided in subsections (b) and (c) of this section, notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law, that prohibits, restricts, or conditions the assignment of such contract or lease, the trustee

may assign such contract or lease under paragraph (2) of this subsection.

(2) The trustee may assign an executory contract or unexpired lease of the debtor only if—

(A) the trustee assumes such contract or lease in accordance with the provisions of this section; and

(B) adequate assurance of future performance by the assignee of such contract or lease is provided, whether or not there has been a default in such contract or lease.

(3) Notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law that terminates or modifies, or permits a party other than the debtor to terminate or modify, such contract or lease or a right or obligation under such contract or lease on account of an assignment of such contract or lease, such contract, lease, right, or obligation may not be terminated or modified under such provision because of the assumption or assignment of such contract or lease by the trustee.

(g) Except as provided in subsections (h)(2) and (i)(2) of this section, the rejection of an executory contract or unexpired lease of the debtor constitutes a breach of such contract or lease—

(1) if such contract or lease has not been assumed under this section or under a plan confirmed under chapter 9, 11, 12, or 13 of this title, immediately before the date of the filing of the petition; or

(2) if such contract or lease has been assumed under this section or under a plan confirmed under chapter 9, 11, 12, or 13 of this title—

(A) if before such rejection the case has not been converted under section 1112, 1208, or 1307 of this title, at the time of such rejection; or

(B) if before such rejection the case has been converted under section 1112, 1208, or 1307 of this title—

(i) immediately before the date of such conversion, if such contract or lease was assumed before such conversion; or

(ii) at the time of such rejection, if such contract or lease was assumed after such conversion.

(h)(1)(A) If the trustee rejects an unexpired lease of real property under which the debtor is the lessor and—

(i) if the rejection by the trustee amounts to such a breach as would entitle the lessee to treat such lease as terminated by virtue of its terms, applicable nonbankruptcy law, or any agreement made by the lessee, then the lessee under such lease may treat such lease as terminated by the rejection; or

(ii) if the term of such lease has commenced, the lessee may retain its rights under such lease (including rights such as those relating to the amount and timing of payment of rent and other amounts payable by the lessee and any right of use, possession, quiet enjoyment, subletting, assignment, or hy-

pothecation) that are in or appurtenant to the real property for the balance of the term of such lease and for any renewal or extension of such rights to the extent that such rights are enforceable under applicable nonbankruptcy law.

(B) If the lessee retains its rights under subparagraph (A)(ii), the lessee may offset against the rent reserved under such lease for the balance of the term after the date of the rejection of such lease and for the term of any renewal or extension of such lease, the value of any damage caused by the nonperformance after the date of such rejection, of any obligation of the debtor under such lease, but the lessee shall not have any other right against the estate or the debtor on account of any damage occurring after such date caused by such nonperformance.

(C) The rejection of a lease of real property in a shopping center with respect to which the lessee elects to retain its rights under subparagraph (A)(ii) does not affect the enforceability under applicable nonbankruptcy law of any provision in the lease pertaining to radius, location, use, exclusivity, or tenant mix or balance.

(D) In this paragraph, "lessee" includes any successor, assign, or mortgagee permitted under the terms of such lease.

(2)(A) If the trustee rejects a timeshare interest under a timeshare plan under which the debtor is the timeshare interest seller and—

(i) if the rejection amounts to such a breach as would entitle the timeshare interest purchaser to treat the timeshare plan as terminated under its

terms, applicable nonbankruptcy law, or any agreement made by timeshare interest purchaser, the timeshare interest purchaser under the timeshare plan may treat the timeshare plan as terminated by such rejection; or

(ii) if the term of such timeshare interest has commenced, then the timeshare interest purchaser may retain its rights in such timeshare interest for the balance of such term and for any term of renewal or extension of such timeshare interest to the extent that such rights are enforceable under applicable nonbankruptcy law.

(B) If the timeshare interest purchaser retains its rights under subparagraph (A), such timeshare interest purchaser may offset against the moneys due for such timeshare interest for the balance of the term after the date of the rejection of such timeshare interest, and the term of any renewal or extension of such timeshare interest, the value of any damage caused by the nonperformance after the date of such rejection, of any obligation of the debtor under such timeshare plan, but the timeshare interest purchaser shall not have any right against the estate or the debtor on account of any damage occurring after such date caused by such nonperformance.

(i)(1) If the trustee rejects an executory contract of the debtor for the sale of real property or for the sale of a timeshare interest under a timeshare plan, under which the purchaser is in possession, such purchaser may treat such contract as terminated, or, in the alternative, may remain in possession of such real property or timeshare interest.

(2) If such purchaser remains in possession—

(A) such purchaser shall continue to make all payments due under such contract, but may, offset against such payments any damages occurring after the date of the rejection of such contract caused by the nonperformance of any obligation of the debtor after such date, but such purchaser does not have any rights against the estate on account of any damages arising after such date from such rejection, other than such offset; and

(B) the trustee shall deliver title to such purchaser in accordance with the provisions of such contract, but is relieved of all other obligations to perform under such contract.

(j) A purchaser that treats an executory contract as terminated under subsection (i) of this section, or a party whose executory contract to purchase real property from the debtor is rejected and under which such party is not in possession, has a lien on the interest of the debtor in such property for the recovery of any portion of the purchase price that such purchaser or party has paid.

(k) Assignment by the trustee to an entity of a contract or lease assumed under this section relieves the trustee and the estate from any liability for any breach of such contract or lease occurring after such assignment.

(*l*) If an unexpired lease under which the debtor is the lessee is assigned pursuant to this section, the lessor of the property may require a deposit or other security for the performance of the debtor's obligations

under the lease substantially the same as would have been required by the landlord upon the initial leasing to a similar tenant.

(m) For purposes of this section 365 and sections 541(b)(2) and 362(b)(10), leases of real property shall include any rental agreement to use real property.

(n)(1) If the trustee rejects an executory contract under which the debtor is a licensor of a right to intellectual property, the licensee under such contract may elect—

(A) to treat such contract as terminated by such rejection if such rejection by the trustee amounts to such a breach as would entitle the licensee to treat such contract as terminated by virtue of its own terms, applicable nonbankruptcy law, or an agreement made by the licensee with another entity; or

(B) to retain its rights (including a right to enforce any exclusivity provision of such contract, but excluding any other right under applicable nonbankruptcy law to specific performance of such contract) under such contract and under any agreement supplementary to such contract, to such intellectual property (including any embodiment of such intellectual property to the extent protected by applicable nonbankruptcy law), as such rights existed immediately before the case commenced, for—

(i) the duration of such contract; and

(ii) any period for which such contract may be extended by the licensee as of right under applicable nonbankruptcy law.

(2) If the licensee elects to retain its rights, as described in paragraph (1)(B) of this subsection, under such contract—

(A) the trustee shall allow the licensee to exercise such rights;

(B) the licensee shall make all royalty payments due under such contract for the duration of such contract and for any period described in paragraph (1)(B) of this subsection for which the licensee extends such contract; and

(C) the licensee shall be deemed to waive—

(i) any right of setoff it may have with respect to such contract under this title or applicable nonbankruptcy law; and

(ii) any claim allowable under section 503(b) of this title arising from the performance of such contract.

(3) If the licensee elects to retain its rights, as described in paragraph (1)(B) of this subsection, then on the written request of the licensee the trustee shall—

(A) to the extent provided in such contract, or any agreement supplementary to such contract, provide to the licensee any intellectual property (including such embodiment) held by the trustee; and

(B) not interfere with the rights of the licensee as provided in such contract, or any agreement supplementary to such contract, to such intellectual property (including such embodiment) including any

right to obtain such intellectual property (or such embodiment) from another entity.

(4) Unless and until the trustee rejects such contract, on the written request of the licensee the trustee shall—

(A) to the extent provided in such contract or any agreement supplementary to such contract—

(i) perform such contract; or

(ii) provide to the licensee such intellectual property (including any embodiment of such intellectual property to the extent protected by applicable nonbankruptcy law) held by the trustee; and

(B) not interfere with the rights of the licensee as provided in such contract, or any agreement supplementary to such contract, to such intellectual property (including such embodiment), including any right to obtain such intellectual property (or such embodiment) from another entity.

(*o*) In a case under chapter 11 of this title, the trustee shall be deemed to have assumed (consistent with the debtor's other obligations under section 507), and shall immediately cure any deficit under, any commitment by the debtor to a Federal depository institutions regulatory agency (or predecessor to such agency) to maintain the capital of an insured depository institution, and any claim for a subsequent breach of the obligations thereunder shall be entitled to priority under section 507. This subsection shall not extend

any commitment that would otherwise be terminated by any act of such an agency.

(p)(1) If a lease of personal property is rejected or not timely assumed by the trustee under subsection (d), the leased property is no longer property of the estate and the stay under section 362(a) is automatically terminated.

(2)(A) If the debtor in a case under chapter 7 is an individual, the debtor may notify the creditor in writing that the debtor desires to assume the lease. Upon being so notified, the creditor may, at its option, notify the debtor that it is willing to have the lease assumed by the debtor and may condition such assumption on cure of any outstanding default on terms set by the contract.

(B) If, not later than 30 days after notice is provided under subparagraph (A), the debtor notifies the lessor in writing that the lease is assumed, the liability under the lease will be assumed by the debtor and not by the estate.

(C) The stay under section 362 and the injunction under section 524(a)(2) shall not be violated by notification of the debtor and negotiation of cure under this subsection.

(3) In a case under chapter 11 in which the debtor is an individual and in a case under chapter 13; if the debtor is the lessee with respect to personal property and the lease is not assumed in the plan confirmed by the court, the lease is deemed rejected as of the conclusion of the hearing on confirmation. If the lease is rejected, the stay under section 362 and any stay under

section 1301 is automatically terminated with respect to the property subject to the lease.

2. 11 U.S.C. 101 provides in pertinent part:

Definitions

In this title the following definitions shall apply:

* * * * *

(35A) The term "intellectual property" means—

(A) trade secret;

(B) invention, process, design, or plant protected under title 35;

(C) patent application;

(D) plant variety;

(E) work of authorship protected under title 17; or

(F) mask work protected under chapter 9 of title 17;

to the extent protected by applicable non-bankruptcy law.

* * * * *

No. 17-1657

In the
Supreme Court of the United States

MISSION PRODUCT HOLDINGS, INC.,

Petitioner,

v.

TEMPNOLOGY, LLC, N/K/A OLD COLD LLC,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the First Circuit

BRIEF OF THE AMERICAN INTELLECTUAL PROPERTY LAW ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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QUESTION PRESENTED

Whether, under § 365 of the Bankruptcy Code, a debtor-licensor's "rejection" of a license agreement—which "constitutes a breach of such contract," 11 U.S.C. § 365(g)—terminates rights of the licensee that would survive the licensor's breach under applicable non-bankruptcy law.

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STATEMENT OF INTEREST

The American Intellectual Property Law Association ("AIPLA"),[1] which files this brief with the written consent of both parties,[2] is a national bar association of approximately 13,500 members engaged in private and corporate practice, government service, and academia. AIPLA's members represent a diverse spectrum of individuals, companies, and institutions involved directly or indirectly in the practice of patent, trademark, copyright, and unfair competition law, as well as other fields of law affecting intellectual property. Our members represent both owners and users of intellectual property. AIPLA's mission includes providing courts with objective analyses to promote an intellectual property system that stimulates and rewards invention, creativity, and investment while

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[1] In accordance with Supreme Court Rule 37.6, AIPLA states that this brief was not authored, in whole or in part, by counsel to a party, and that no monetary contribution to the preparation or submission of this brief was made by any person or entity other than AIPLA and its counsel. Specifically, after reasonable investigation, AIPLA believes that (i) no member of its Board or Amicus Committee who voted to file this brief, or any attorney in the law firm or corporation of such a member, represents a party to the litigation in this matter; (ii) no representative of any party to this litigation participated in the authorship of this brief; and (iii) no one other than AIPLA, or its members who authored this brief and their law firms or employers, made a monetary contribution to the preparation or submission of this brief.

[2] AIPLA has obtained the consent of the parties to file this amicus brief, pursuant to Supreme Court Rule 37.3(a). Petitioner consented by counsel in a December 5, 2018 email sent to AIPLA. Respondent consented by counsel in a December 10, 2018 sent to AIPLA.

accommodating the public's interest in healthy competition, reasonable costs, and basic fairness. AIPLA has no stake in any of the parties to this litigation or in the result of this case. AIPLA's only interest is in seeking correct and consistent interpretation of the law as it relates to intellectual property issues.

SUMMARY OF ARGUMENT

The simple answer to the question presented is "no": rejection of a trademark license agreement does not terminate rights of the licensee that would survive the licensor's breach under applicable non-bankruptcy law.

The question presented assumes the rights of the licensee survive under applicable non-bankruptcy law. AIPLA posits that should be the test. Whether or not a trademark licensee retains its rights to use the licensed mark following the debtor-licensor's rejection of an executory contract containing a trademark license must be determined under applicable non-bankruptcy law. The resolution of that inquiry also should turn on the language of the contract (including any equitable relief that would otherwise apply to the license under applicable non-bankruptcy law).

A plain reading of Section 365 supports this position. Rejection by the debtor of an executory contract constituting a trademark license is only a breach. In the absence of the Bankruptcy Code specifically addressing trademark licenses, the effect of the breach must be decided under applicable non-bankruptcy law and the language of the contract.

This approach does not mean rights of a trademark licensee always survive rejection or that Section 365(n) of the Bankruptcy Code protects the rights of a trademark licensee. Nor does this approach mean the rights of a trademark licensee are always terminated following rejection, the view of the court of appeals in this case.

The rationale relied upon by the court of appeals in holding that the rights of the licensee were terminated following rejection was based upon the concept of the debtor-licensor's obligation to monitor quality control over the licensee. If the debtor-licensor failed to exercise quality control, a "naked license" could result, jeopardizing the continued validity of the debtor-licensor's trademark. *In re Tempnology, LLC*, 879 F.3d 389, 402–03 (1st Cir.), *cert. granted in part sub nom. Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 397 (2018). The court of appeals observed that the licensee's continued use of the licensed mark following rejection would force the debtor-licensor to choose between performing executory obligations of quality control or risk losing the trademark. *Id.* at 403.

AIPLA submits that a trademark licensor's obligation to control the quality of the goods associated with the licensed mark is not an obligation arising under the rejected trademark license, which, in some cases, may not even expressly address the issue. Rather, quality control is an independent obligation firmly grounded in trademark law. Following rejection, trademark law, not the rejected contract, continues to impose upon a debtor-licensor the obligation to

control the quality of the goods produced by its licensee if the licensor wishes to maintain the strength and value of the mark and retain rights to it. Consequently, although a *licensee* must *comply* with any quality-control provisions in the license as a matter of contract law, the complete failure of a *licensor* to *enforce* those provisions ordinarily will not constitute a breach of contract; instead, the potential negative consequence of that failure, namely, the risk of a naked license, has a different provenance.

The consequences of the debtor-licensor failing to enforce the quality-control provisions of a license following rejection are thus independent of the terms of the rejected contract. Rejection only relieves a debtor of executory obligations in the contract. Nothing in the Bankruptcy Code negates applicable trademark law following rejection of a trademark license.

AIPLA therefore urges the Court to limit its decision here solely to the question presented. Lower courts should be allowed to develop appropriate relief as to the rights of a trademark licensee following rejection on a case-by-case basis based upon the terms of the rejected contract and applicable non-bankruptcy law. Such a decision would be consistent with the legislative history of Section 365(n). AIPLA does not take a position on the ultimate issue of whether the rejection of the particular license at issue in this case should have resulted in termination of the licensee's rights. Its position is that the rejection of that license does not compel such a conclusion. The resolution of that issue depends on the terms of the specific license agreement and applicable non-bankruptcy law.

ARGUMENT

I. BACKGROUND

The test for trademark infringement under the common law and the federal Lanham Act is whether a defendant's conduct has created a likelihood of confusion as to whether its goods or services originate with the plaintiff or are otherwise connected to, affiliated with, or sponsored by the plaintiff. 15 U.S.C. §§ 1114(1), 1125(a). In effect, a trademark license is permission from the trademark owner to engage in behavior that would otherwise infringe the mark. *See Brennan's Inc. v. Dickie Brennan & Co.*, 376 F.3d 356, 364 (5th Cir. 2004) ("A license gives one party the right to use another party's mark (*i.e.*, to engage in otherwise infringing activity), generally in exchange for a royalty or other payment.").

Trademark licenses exist in myriad relationships and transactions. For example, the license may be straightforward permission to manufacture goods and apply the trademark owner's mark to the goods and to sell them. The license may describe a co-branding relationship, where two parties' marks are used on the same product, such as a component or ingredient used in a product offered by another, like an HP computer with a label "Intel Inside," indicating the brand of computer chip in the laptop. A trademark owner can license its mark for use on promotional goods, allowing a manufacturer of T-shirts to affix the mark to the front of the shirts. The T-shirt company might sell these shirts to the public and pay a per-product royalty to the trademark owner, or it might sell the shirts exclusively to the trademark owner for

its own distribution, with the trademark owner paying the licensee for the manufacturing. A trademark license may allow another to promote a sponsorship relationship such as, for example, where companies pay to become "platinum," "gold" and "silver" sponsors of a trade conference. A license to use a certification mark, such as the UL-branding on electrical goods, indicates the licensed party's goods meet the certifying party's standards.

There may be only one licensee or there may be many. The license can be exclusive or non-exclusive. Licensees can be divided territorially, as is often done in licenses for franchises. These licenses may vary with differing standards for different markets, such as a license one manufacturer to produce goods of one quality for the discount apparel channel and a license to a different manufacturer to produce a higher quality good for the department store apparel channel.

A license may be royalty-free if, for example, the promotional value of merely being identified with the licensee is adequate consideration. The payment can flow either way: trademark owners sometimes pay significant sums to licensees for their branding to appear in sporting venues and films.

Trademark licenses also come in many forms. A trademark license can be oral. *See, e.g., Transgo Inc. v. Ajac Transmission Parts Corp.*, 768 F.2d 1001, 1018 (9th Cir. 1985). It may be incomplete or ambiguous. *See, e.g., Intersport, Inc. v. Nat'l Collegiate Athletic Ass'n*, 885 N.E.2d 532, 541 (Ill. Ct. App. 2008) (referring to dictionary definitions to resolve meaning of disputed term in license). It may only be implied,

based on how the parties interacted. *See, e.g., Villanova Univ. v. Villanova Alumni Educ. Found., Inc.*, 123 F. Supp. 2d 293, 308 (E.D. Pa. 2000).

This complexity and variety make it difficult to agree on simple rules for how to treat trademark licenses in bankruptcy. In fact, the legislative history of the enactment of Section 365(n) plainly states that Congress recognized trademarks were unique and, because it required more study, expressly postponed congressional action in this area to allow bankruptcy courts to develop an equitable treatment for trademark licenses. S. Rep. No. 100-505, at 5 (1988).

The omission of trademarks from the definition of intellectual property in Section 365(n) was thus intentional. The decision by the court of appeals that Section 365 never allows for an election by the licensee to retain a license granted in a rejected contract is wrong because such an interpretation will always favor the licensor and frustrates the intent of Congress. It cannot be considered an equitable treatment, and it precludes any further consideration of what might be such a treatment.

Treating the rejection of an executory contract granting a trademark license as merely a breach is the most reasonable interpretation of the statute. With a directive to apply non-bankruptcy law from this Court, bankruptcy courts may apply and, as necessary, further develop that law to reach equitable treatments of trademark licenses in bankruptcy. This is not to say that bankruptcy courts may resort to "undefined considerations of equity" in determining the effect of rejection in a particular case. *Butner v.*

United States, 440 U.S. 48, 56 (1979). Rather, the bankruptcy court's treatment of a breached trademark license should rest on applicable non-bankruptcy law, including, where appropriate, recognized equitable doctrines that would be available had the breach occurred outside of bankruptcy.

II. THE SIGNIFICANCE OF REJECTION OF TRADEMARK LICENSES UNDER SECTION 365

A. Section 365 of the Bankruptcy Code Does Not Mandate Termination of a Trademark License Upon Rejection of the Contract

1. Rejection Under Section 365 Results in a Breach, and Applicable Non-Bankruptcy Law Determines the Parties' Rights

Section 365(a) of the Bankruptcy Code allows a bankruptcy trustee or debtor-in-possession (collectively referred to herein as a debtor) either to assume an executory contract and continue to satisfy all of its contractual obligations or to reject the contract and be relieved of the obligation to specifically perform any of its affirmative obligations under the contract. 11 U.S.C. § 365(a).[3]

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[3] AIPLA notes this litigation involves only executory trademark licenses, not trademark licenses determined to be nonexecutory. *See, e.g., In re Interstate Bakeries Corp.*, 751 F.3d 955 (8th Cir.

Should the debtor reject an executory contract, section 365(g) of the Bankruptcy Code expressly provides that such rejection "constitutes a breach of such contract ... immediately before the date of the filing of the petition." 11 U.S.C. § 365(g). Absent a specific provision of the Bankruptcy Code to the contrary, the consequences of that breach on the counterparty's rights under the contract are properly determined by the terms of the contract and applicable non-bankruptcy law. The Bankruptcy Code contains no such specific provision for rejection of a trademark license.[4]

In 1985, prior to the Bankruptcy Code containing any specific provision as to the effect of rejection of an intellectual property license, the Court of Appeals for the Fourth Circuit nevertheless concluded that, as a matter of bankruptcy law, a debtor-licensor's rejection of an intellectual property license terminated the non-debtor-licensee's rights to use the previously licensed intellectual property. *Lubrizol Enters. v. Richmond Metal Finishers, Inc.*, 756 F.2d 1043 (4th Cir. 1985). The decision was controversial and heavily criticized. In 1988, Congress directly responded to *Lubrizol* by enacting section 365(n) of the

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2014) (en banc); *In re Exide Techs.*, 607 F.3d 957 (3d Cir. 2010), *as amended* (June 24, 2010).

[4] The Bankruptcy Code does contain specific provisions for the rejection of other types of contracts, such as section 365(h) addressing the rejection of an unexpired lease of real property and as discussed herein, addressing the rejection of certain types of intellectual property contracts but not contracts containing a trademark license.

Bankruptcy Code, which provides that, upon the rejection of an intellectual property license in a debtor-licensor's bankruptcy case, the non-debtor licensee has the option of treating the license as terminated or continuing to use the licensed intellectual property while making applicable royalty payments for the duration of the license's term without setoff and without claiming an administrative expenses for damages resulting from the breach.[5]

While section 365(n) of the Bankruptcy Code addressed "intellectual property" licenses, Congress specifically chose not to include trademarks in the definition of "intellectual property" found in section 101(35A) of the Bankruptcy Code. 11 U.S.C. §§ 101(35A), 365(n). The exclusion of trademarks was not a glaring oversight, but an intentional omission:

> [T]he bill does not address the rejection of executory trademark, trade name or service mark licenses by debtor-licensors. While such rejection is of concern because of the interpretation of section 365 by the Lubrizol court and others, ... such contracts raise issues beyond the scope of this legislation. In particular, trademark, trade name and service mark licens-

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[5] An "administrative expense" claim must be paid in full on the effective date of a confirmed chapter 11 plan. 11 U.S.C. §§ 503(b)(1), 507(a)(2), 1129(a)(9)(A). *See, e.g., Reading Co. v. Brown*, 391 U.S. 471 (1968) (decided under Bankruptcy Act, trustee's actions can create an administrative expense claim against the estate).

> ing relationships depend to a large extent on control of the quality of the products or services sold by the licensee. Since these matters could not be addressed without more extensive study, it was determined to postpone congressional action in this area to allow the development of equitable treatment of this situation by bankruptcy courts.

S. Rep. No. 100-505, at 5 (1988). As is evident from the legislative history of section 365(n), the exclusion of trademarks from its ambit was not an endorsement of the *Lubrizol* approach regarding the effect of the rejection of a trademark license in a licensor's bankruptcy case.

In *Sunbeam Products, Inc. v. Chi. American Manufacturing, LLC*, 686 F.3d 372 (7th Cir. 2012), the Court of Appeals for the Seventh Circuit declined to follow the *Lubrizol* approach in determining the effect of rejection of a trademark license agreement in a licensor's bankruptcy case. It held instead that the rejection of a trademark license agreement in a licensor's bankruptcy case constitutes, under section 365(g) of the Bankruptcy Code, a breach of such executory contract by the licensor. Outside of bankruptcy, such a breach would not, *in and of itself*, terminate the licensee's right to continue to use the licensed mark(s) or its obligation to comply with the license, if it elected to continue to use the mark. *Id.* at 377.

The First Circuit Bankruptcy Appellate Panel in this case agreed with the *Sunbeam* rationale. As articulated by the bankruptcy appellate panel:

> Applying *Sunbeam*'s rationale, we conclude that, while the Debtor's trademark and logo were not encompassed in the categories of intellectual property entitled to special protections under § 365(n), the Debtor's rejection of the Agreement did not vaporize Mission's trademark rights under the Agreement. Whatever post-rejection rights Mission retained in the Debtor's trademark and logo are governed by the terms of the Agreement and applicable non-bankruptcy law.

Mission Prod. Holdings, Inc. v. Tempnology LLC (In re Tempnology LLC), 559 B.R. 809, 822-23 (1st Cir. B.A.P. 2016).

In reversing the decision of the bankruptcy appellate panel, the Court of Appeals for the First Circuit rejected the conclusion in the *Sunbeam* case and held that bankruptcy extinguishes a trademark licensee's right to continue to use a licensed mark when a trademark license agreement is rejected in the licensor's bankruptcy case. The court concluded that Section 365 of the Bankruptcy Code is intended to empower a bankrupt debtor to free itself from burdensome performance obligations under an executory contract and that a licensee's continued use of licensed marks on a post-rejection basis would frustrate that purpose. 879 F.3d at 404.

In doing so, the court of appeals properly recognized that a trademark licensor must maintain some measure of control over the quality of goods associated with the licensed mark or risk the loss of its rights in that mark under the doctrine of abandonment. *Id.* at 402-03. Ignoring the trademark-law provenance of that obligation, however, the court treated it as an executory obligation of the debtor and concluded that the alleviation of that obligation required a holding that rejection extinguishes a licensee's right to continue using any marks covered by the license. *Id.* at 404.

As discussed in more detail in the following section, any burden attending the maintenance of quality control is not contractual and does not arise under the rejected contract, but rather is an inherent obligation of a trademark owner originating in trademark law. Indeed, as quoted by the court of appeals, the contract in question contained a "right" to monitor quality control, not an obligation to do so. *Id.* at 402 ("The Agreement provides that Debtor 'shall have the right to review and approve all uses of its Marks,' except for certain pre-approved uses.").

While rejection of an executory contract converts the debtor's "unfulfilled obligations" to the counterparty under the contract into damages and insulates the debtor from specific performance of affirmative obligations imposed by the contract, rejection does not alter applicable trademark law following a licensor's breach. Rejection of a trademark license alters neither the debtor-licensor's independent quality-control obligation under trademark law nor the

parties' remedies should the debtor-licensor fail to fulfill that obligation following rejection. Rejection does not vaporize the rights of the counterparty to such a contract, *Sunbeam Prods.*, 686 F.3d at 377, nor does rejection vaporize applicable trademark law following rejection. Nothing in the Bankruptcy Code relieves a debtor-licensor of the effect of trademark law following the rejection of a trademark license.

The bankruptcy appellate panel persuasively concluded in this case that, as a matter of bankruptcy law, rejection did not extinguish the licensee's right to use the licensed marks and that the terms of the agreement and applicable non-bankruptcy law govern the rejection's effect on the agreement. *Tempnology*, 559 B.R. at 822-23. In the absence of a provision of the Bankruptcy Code specifically addressing the effect of the rejection of a trademark license, the holding of the bankruptcy appellate panel properly construes the Bankruptcy Code in its current form. *Butner*, 440 U.S. at 55 (holding that the justification for application of state law in a bankruptcy context to define property interests is not limited to ownership interests). This Court should reach the same conclusion.

2. The Need to Exercise Control Over a Trademark Licensee Arises Independently Under Trademark Law and Does Not Amount to a Debtor-Licensor Performing Under an Otherwise Rejected Contract

Subject to certain exceptions not relevant here, the rights to a particular trademark under United

States law depend on the ongoing use of the mark. That use need not be by the mark's owner itself. Rather, both the common law and Section 5 of the Lanham Act, 15 U.S.C. § 1055, permit the owner to allow another party, a "related company," to use the mark. *See, e.g., Turner v. H M H Publ'g Co.*, 380 F.2d 224 (5th Cir. 1967) ("Section 5 of the Lanham Act ... contemplates that a trade or service mark may be acquired through its use by controlled licensees, even though the registrant itself may not have used the mark."). The use by that "related company, i.e., a licensee, will inure to the licensor's benefit if the licensor has controlled the licensee's use of the mark. 15 U.S.C. § 1127 (defining "related company" in terms of control).

Section 45 of the Lanham Act provides that a trademark will be abandoned if it loses significance as an indication of origin of the mark owner's goods. *Id.* This may happen if the licensor has not exercised control over the nature and quality of its licensee's goods and services. In such a case, the licensee's use does not inure to the licensor's benefit, and the mark will begin to indicate that the goods associated with the mark originate with the licensee, rather than the licensor. In extreme cases, the mark may lose all significance as a trademark.

At that point, the parties' agreement will become a "naked" license that may work a forfeiture of the licensor's rights. *See generally Sheila's Shine Prods., Inc. v. Sheila Shine, Inc.*, 486 F.2d 114, 123-24 (5th Cir. 1973); *Dawn Donut Co. v. Hart's Food Stores, Inc.*, 267 F.2d 358, 366 (2d Cir. 1959). Whether

abandonment actually occurs is a fact-specific inquiry, and the legal standards for finding a naked license vary among the various courts of appeal. *See, e.g.*, *Patsy's Italian Rest., Inc. v. Banas*, 658 F.3d 254, 264 (2d Cir. 2011) ("Although some forms of trademark abandonment may result in a loss of all rights in the mark, abandonment of a mark through naked licensing has different effects on the validity of the mark in different markets." (citation omitted)); *Sheila's Shine*, 486 F.2d at 125 ("[A] trademark owner has an appropriate time, or grace period, for the exercise of control over a licensee's use of a mark. Of necessity, this period varies according to the peculiar facts of each individual case.").

Because of the common-law and statutory origins of the control requirement, a trademark license typically does not discuss quality control as an affirmative duty of the licensor, but instead defines the required quality in terms of the compliance obligations of the licensee. The licensee's obligation to comply with the quality-control provisions of the license is contractual in nature. In a properly drafted license, therefore, the licensor's remedy for the licensee's failure to comply with those terms is termination of the license.

In contrast, the licensor's quality-control obligation arises under applicable non-bankruptcy law because of the debtor-licensor's decision to enter into a trademark license and is a natural consequence of that decision. Allowing a licensee to retain its license after rejection therefore should not require a debtor to perform an executory license agreement or impose a new obligation on the debtor-licensor. Whether or not

it rejects the license, a debtor-licensor is not relieved of the obligation created under trademark law to preserve the licensed mark's origin-indicating significance if the debtor-licensor wishes to maintain the mark as an asset.

The maintenance of quality control therefore is an important obligation of all trademark licensors, but the court of appeals in this case may have overstated the burden of that obligation. Specifically, a licensor need not require a particular level of quality so long as it has the ability to enforce whatever level of quality it sets. "'[Q]uality control' does not necessarily mean that the licensed goods or services must be of 'high' quality, but merely of equal quality, whether that quality is high, low or middle." *Barcamerica Int'l USA Tr. v. Tyfield Imps., Inc.*, 289 F.3d 589, 598 (9th Cir. 2002). In other words, control, not the actual quality subject to that control, is the issue in the inquiry into whether a naked license exists.

Although a trademark licensor may wish to escape a license for myriad reasons, two in particular merit consideration in this proceeding. First, the licensor may conclude that the investment required for the continued monitoring of a licensee's compliance with a particular quality-control provision recited in the license is no longer cost-effective. Second, the licensor's goal may be to monetize its mark to the fullest extent possible by securing higher royalty payments from a different licensee; of course, any claimed burden associated with quality control is merely a pretext in this context.

Whether in or out of bankruptcy, a licensor genuinely motivated by the first of these considerations can approach its licensee and propose an amendment to the license to eliminate the quality-control provision at issue. Because such an amendment will work exclusively in the licensee's favor, the licensee ordinarily can be expected to accept it. Even if the licensee does not do so, however, or if the licensor prefers not to raise the issue, the licensor can simply elect not to enforce the objectionable provision, so long as it continues to assure a minimum level of quality in some way. Such a strategy can result in the licensor's waiver of the provision on a going-forward basis and a diminishment in the quality of the goods sold under the license. Even if it occurs, that diminishment will not itself render the license a naked one because whether a good produced under the license is "objectively 'good' or 'bad' is simply irrelevant." *Id.* Trademark licensors in bankruptcy proceedings therefore have an option short of rejection, one that does not expose licensees to an outright rejection motivated by the licensor's desire for better terms from another licensee.

Of course, if the debtor-licensor fails to fulfill its quality-control obligation altogether following rejection, a clever licensee could try to take advantage of the situation by electing to retain the license following rejection and then arguing the debtor-licensor has abandoned the mark by failure to exercise control. Nevertheless, licensee estoppel can ameliorate this risk. As a general rule, a trademark licensee is estopped from challenging the validity of the licensor's title because the licensee has recognized the validity of the licensor's ownership by agreeing to the license.

See, e.g., John C. Flood of Va., Inc. v. John C. Flood, Inc., 642 F.3d 1105, 1110 (D.C. Cir. 2011); *Seven–Up Bottling Co. v. Seven–Up Co.*, 561 F.2d 1275, 1279–80 (8th Cir. 1977). *But see Idaho Potato Comm'n v. M & M Produce Farm & Sales*, 335 F.3d 130, 137 (2d Cir. 2003) (invoking public interest to reject licensee estoppel provision in certification mark license).

B. Applying Non-Bankruptcy Law to Determine the Effect of Breach Will Allow Courts to Develop Equitable Treatment of Trademark Licenses in Bankruptcy

Although AIPLA rejects the *per se* rule applied by the court of appeals in this case that trademark licenses must always terminate when the underlying contract is rejected, it cautions against an assumption that trademark licenses always survive or that the licensee will be free to fully enjoy the license following rejection. Outside of bankruptcy proceedings, the proper treatment of a licensor's breach of a trademark license turns on the express terms of the license and governing state and federal law. Whether a licensee may elect not to terminate the contract, and the relief available to the parties in bankruptcy, depends on the contract and applicable non-bankruptcy law, subject to the unavailability of specific performance against the debtor-licensor following rejection.

Furthermore, perhaps more so than in any other area of intellectual property law, there is a strong public interest component in trademark law.

The terms of the license and governing state and federal law should guide the bankruptcy court's actions when it fashions relief following rejection.

1. Non-Bankruptcy Law Will Govern the Licensee's Continued Use of the Licensed Mark After Rejection

If a license is not terminated, and the licensee elects to continue using the licensed mark under the rejected license, it must continue to fulfill its obligations to the licensor:

> Under basic contract principles, when one party to a contract feels that the other contracting party has breached its agreement, the non-breaching party may either stop performance and assume the contract is avoided, or continue its performance and sue for damages. Under no circumstances may the non-breaching party stop performance and continue to take advantage of the contract's benefits.

S & R Corp. v. Jiffy Lube Int'l, Inc., 968 F.2d 371, 376 (3d Cir. 1992).

A failure of a licensee to adhere to the terms of the rejected license, including the licensor's standards, also means the resulting goods are unlicensed. Continued use of the licensor's trademark on them infringes that mark, potentially exposing the licensee to infringement remedies. *See, e.g., El Greco Leather Prods. Co. v. Shoe World, Inc.*, 806 F.2d 392, 395 (2d

Cir. 1986) (failure to obtain certificate of inspection from licensor rendered mark on goods infringing); *see also Warner-Lambert Co. v. Northside Dev. Corp.*, 86 F.3d 3, 8 (2d Cir. 1996) (enjoining the sale of stale product even though the contract did not expressly prohibit its sale).

Admittedly, not all licensing situations may be as straightforward as reading a written agreement and simply enforcing those terms not requiring specific performance by the licensor. Sometimes trademark licenses are informal, incomplete, or ambiguous; indeed, they may not be written. *See, e.g.*, *Transgo*, 768 F.2d at 1018 (describing oral license). The bankruptcy court may therefore need to determine exactly what the contract requires of the licensee. Nevertheless, any such need will not be extraordinary and does not justify terminating licenses to reduce the burden associated with administering the estate. There is ample precedent to decide any issues that may arise.

A licensee's duty to comply with its quality control obligations can take many forms. The licensee's duty can be described expressly in a contract, to a greater or lesser degree, and may be expressed briefly and without detail:

> The use by each of the other's Marks shall be in accordance with the standards for quality control set by the owner of the Marks, and solely for the purposes permitted by this Agreement, and subject to the other party's right to review and approve

> (or reject) in advance each proposed use by the first party of the other party's Marks.

3 MARY M. SQUYRES AND NANETTE NORTON, TRADEMARK PRACTICE THROUGHOUT THE WORLD, JOINT PROMOTION AND MARKETING AGREEMENT Appendix 30(B) (April 2018 update). Or the licensor may have set out for the licensee standards in detail, describing the right to approve style, colors, materials, method of fabrication and labeling, and prohibiting the use of noxious chemicals in manufacture. *See, e.g., Trademark License Agreement Between Tommy Bahama Group, Inc. and Phoenix Footwear Group, Inc.* (Dec. 8, 2008) https://www.sec.gov/Archives/edgar/data/26820/000119312508253523/dex101.htm.

If not in the agreement itself, quality control may be manifested in the actual control exercised by a licensor. *See, e.g., Dawn Donut Co. v. Hart's Food Stores, Inc.*, 267 F.2d 358, 367 (2d Cir. 1959) (control adequate when local sales representatives visited store). There can also be adequate control if the relationship is one allowing the court to assume the licensee is acting in the best interest of the licensor. *See, e.g., Taco Cabana Int'l, Inc. v. Two Pesos, Inc.*, 932 F.2d 1113, 1121-22 (5th Cir. 1991) (finding that two brothers who ran a chain of restaurants and later divided the business could rely on each other to maintain quality), *aff'd* 505 U.S. 763 (1992); *Transgo*, 768 F.2d at 1017-18 (finding sufficient control where licensor was a friend of licensee, licensee was knowledgeable about the goods, and only a small amount of product was manufactured by licensee); *Land O'Lakes Creameries, Inc. v. Oconomowoc Canning Co.*, 330

F.2d 667, 670 (7th Cir. 1964) (finding sufficient control where the licensee sold product for 40 years without complaints about quality).

No matter how it is done, control is the sine qua non of a trademark license. *See generally* F. Vern Lahart, *Control—The Sine Qua Non of a Valid Trademark License*, 50 TRADEMARK REP. 103 (1960); *see also Taco Cabana*, 932 F.2d at 1121 ("The purpose of the quality-control requirement is to prevent the public deception that would ensue from variant quality standards under the same mark or dress."). Whether or not the license says anything about how the control is exercised, it is "the principal requirement applicable to all trademark licenses." *E. & J. Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1290 (8th Cir. 1992). Therefore, in construing a license, the only appropriate construction is confirming the licensee's duty to observe the licensor's standards.

Furthermore, if the licensee cannot produce or sell the goods or services under the trademark by reason of quality-control provisions, the effect would be that the licensee could no longer enjoy the benefit of the license. The licensee presumably would have no choice but to terminate the contract. Consider as an example a contract containing a trademark license. The contract requires the licensee to submit a prototype for a product to the licensor for approval before manufacture can begin and, if the licensor fails to respond within a set period, the prototype will be rejected, preventing the product's manufacture. If the licensor does not respond, the licensee may not manufacture the product and, if the license so provides, is left only with a claim against the licensor for breach.

As another example, suppose a trademark license allows the licensee to manufacture a bottled beverage by adding carbonation and water to a proprietary syrup provided by the licensor, using the trademark on the bottled product. Assume further the license does not have any express quality control provisions, stating only how much syrup the licensee must purchase and requiring that it be diluted and carbonated by a certain amount. Even in the absence of an express quality control provision, the end product, the bottled drink, will be of known quality assured by the use of the proprietary syrup. If the licensor no longer manufactures syrup, it must be clear the licensee cannot substitute a different syrup, even if the agreement is silent, because the use of the proprietary syrup is fundamental to ensuring the licensed product meets the licensor's quality control standards.

A bankruptcy court would have the authority to clarify the contract in this manner and forbid the licensee from using a different syrup. If it means the licensee can no longer create bottled drinks, the licensee's only remedy is monetary relief for the licensor's breach in failing to provide the syrup. The licensee does not have the latitude to create an altogether different drink with a different syrup and then sell it under the formerly licensed mark. Even though the bankruptcy court may make such a determination, the ruling is not based on bankruptcy law, rather the ruling is based on non-bankruptcy law applicable to the license in question and the Code's provision prohibiting specific performance against the debtor.

Where terms are ambiguous or missing courts have implied them. For example, the term of the license may be unclear. *See, e.g., TMT N. Am., Inc. v. Magic Touch GmbH*, 124 F.3d 876, 882 (7th Cir. 1997) (affirming magistrate judge's conclusion that the trademark was implicitly licensed for the term of the agreement); *Bank of N.C. v. RCR Mktg., LLC*, No. 1:10CV663, 2010 WL 5020502, at *4 (M.D.N.C. Dec. 3, 2010) (where there was no evidence of a written license, ordering licensee to comply with debtor-licensor's quality control). As with any contract, it is well within the bankruptcy court's ability and powers, guided by applicable non-bankruptcy law and relying on well-settled principles of contract interpretation, to ascertain the true meaning of these contracts, including the geographic and temporal scope of the license granted and the goods and services involved, the conditions on the grant of the license, and the responsibilities of the licensee.

2. Non-Bankruptcy Law Occasionally Allows for the Termination of a Trademark License in the Absence of a Breach by the Licensee

AIPLA believes it possible, without resorting to unenforceable *ipso facto* clauses, to structure transactions involving a trademark license so the license cannot or does not survive in the event of a licensor breach. Treating rejection as merely a breach will be consistent with the parties' expectations in these circumstances.

Furthermore, even in the absence of such a result, trademark law has long recognized that contracts regarding trademarks can be terminated in certain circumstances. A bankruptcy court may be able to invoke non-bankruptcy law principles to terminate or modify a license. This principle arises from this Court's decision in *Lear, Inc. v. Adkins*, 395 U.S. 653 (1969). *Idaho Potato Comm'n*, 335 F.3d at 137 (citing *Lear* as the source of the law as applied in the trademark context); *Beer Nuts, Inc. v. King Nut Co.*, 477 F.2d 326, 328 (6th Cir. 1973) (same). *Lear*, a patent case, established that the public interest plays a role in determining the enforceability of provisions of a patent license. *Lear*, 395 U.S. at 670–71. Although originally stated in a patent case, this principle has also been applied to trademark licenses.

Trademark law, even more so than patent law, has a significant public interest component. The public is a stakeholder in trademark law, because the law protects consumers from being deceived into purchasing an unwanted good bearing an infringing mark, *Amoskeag Mfg. Co. v. D. Trainer & Sons*, 101 U.S. 51, 62 (1879). That law also ensures needed vocabulary is available. *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 210 (1985). Although originally stated in a patent case, this principle has also been applied to trademark licenses.

Under applications of these principles in trademark cases, a party entering into an agreement with respect to a trademark will be held to its obligations unless enforcement of the contract would injure the public. *VISA Int'l Serv. Ass'n v. Bankcard Holders of Am.*, 784 F.2d 1472, 1473 (9th Cir. 1986) (considering

public interest in avoidance of confusion); *Beer Nuts, Inc. v. King Nut Co.*, 477 F.2d 326, 329 (6th Cir. 1973) (depletion of vocabulary); *Proriver, Inc. v. Red River Grill, LLC*, 83 F. Supp. 2d 42, 45 (D.D.C. 1999) (confusion); *Kegan v. Apple Comput., Inc.*, No. 95 C 1339, 1996 WL 667808, at *3 (N.D. Ill. Nov. 15, 1996) (vocabulary); *see also Peyrat v. L.N. Renault & Sons, Inc.*, 247 F. Supp. 1009, 1014 (S.D.N.Y. 1965) (an agreement between parties to a trademark controversy "is valid and enforceable so long as no injury is caused to the public").

A court should weigh the public interest and resulting harm against contract law's policy of holding parties to the terms of their agreements. *VISA Int'l*, 784 F.2d at 1474–75 (citing *T & T Mfg. Co. v. A.T. Cross Co.*, 449 F. Supp. 813, 827 (D.R.I.), *aff'd*, 587 F.2d 533 (1st Cir. 1978)); *Beer Nuts*, 477 F.2d at 328. If the public harm outweighs the policy of holding parties to their agreement, the agreement can be terminated or modified. *VISA Int'l*, 784 F.2d at 1473-74 (considering both rescission and modification of contract); *Idaho Potato Comm'n*, 335 F.3d at 139 (preventing enforcement of no-challenge provision in license agreement for certification mark). Thus, in certain situations, the debtor-licensor may have an opportunity to seek to rescind or modify the license if the license otherwise will harm the public interest.[6]

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[6] A debtor seeking such equitable relief following rejection may be required to seek such relief in an adversary proceeding. Fed. R. Bankr. Pro. 7001(7) (injunction or other equitable relief) and 7007(9) (declaratory relief).

III. CONCLUSION

Under bankruptcy law, the rejection of an executory contract constitutes a breach of the contract. Clarification that the effect of the breach and any available relief must be determined using recognized principles of non-bankruptcy law and applicable principles of equity, subject to limits imposed by the Bankruptcy Code on specific performance, will better enable bankruptcy courts to determine the parties' rights following rejection of a trademark license and serve the public interest in preventing consumer confusion.[7] In addition, parties negotiating trademark license agreements will be able to make better-informed decisions about the provisions that need to be included in such agreements to protect their respective interests in the event of a licensor bankruptcy.

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[7] This approach will not disadvantage less capitalized licensors in their negotiations with potential licensees. Potential licensees may perceive these licensors as more likely to seek bankruptcy protection than larger companies (and then reject licenses into which they have entered). These licensors therefore may have to make concessions in negotiations in light of the risk they will reject the licenses down the road. They also may miss out on licensing opportunities altogether because the risk of their possible bankruptcy is perceived to be too high. More certainty for the licensee means the small business licensor will have greater opportunity to enter into favorable licensing arrangements.

Respectfully submitted,

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No. 17-1657

In the Supreme Court of the United States

MISSION PRODUCT HOLDINGS, INC., PETITIONER,

v.

TEMPNOLOGY, LLC, N/K/A OLD COLD LLC,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF THE INTELLECTUAL PROPERTY OWNERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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QUESTION PRESENTED

Whether, under §365 of the Bankruptcy Code, a debtor-licensor's "rejection" of a license agreement—which "constitutes a breach of such contract," 11 U.S.C. §365(g)—terminates rights of the licensee that would survive the licensor's breach under applicable non-bankruptcy law.

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INTEREST OF THE *AMICUS CURIAE*

Amicus curiae Intellectual Property Owners Association (IPO) is an international trade association representing companies and individuals across all industries and fields of technology who own or are otherwise interested in intellectual property rights.[1] IPO's membership includes about 200 companies and over 12,000 individuals who are involved in the association, either through their companies or as inventor, author, executive, law firm, or attorney members. Founded in 1972, IPO represents the interests of owners of intellectual property before Congress and the United States Patent and Trademark Office (USPTO). IPO's members include both licensors and licensees of trademarks and other intellectual property, across various industries and fields. IPO has filed *amicus* briefs in this Court and other courts on significant issues of intellectual property law. The members of IPO's Board of Directors, which approved the filing of this brief, are listed in the Appendix.[2]

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amicus curiae or its counsel made a monetary contribution to its preparation or submission. Both parties have consented to the filing of this brief.

[2] IPO procedures require approval of positions in briefs by a two-thirds majority of directors present and voting.

STATEMENT

This case concerns a split of circuit authority about application of the Bankruptcy Code, 11 U.S.C. § 365, to trademark licenses. Three circuits have weighed in, taking two different approaches:

1. In the decision below, the First Circuit held that if a debtor-licensor "rejects" a trademark license under section 365(a), the licensee loses its rights. This "categorical approach," in the court of appeals' words, leaves trademark licensees "unprotected from court-approved rejection." Pet. App. 27a. In holding so, the court observed that section 365(n) allows a licensee of "intellectual property" a choice when facing rejection: it can treat the license as terminated and bring a claim for pre-petition damages, or it can retain its rights under the license. *Id.* at 10a-11a. However, the court then noted that 11 U.S.C. § 101(35A), which defines "intellectual property" for the Bankruptcy Code, does not include trademarks. *Id.* at 20a. Thus, the court held, trademark licensees do not have this same choice. See *id.* at 20a-27a. If a trademark license is rejected, the licensee's only option is a pre-petition damages claim. *See id.*

In the court of appeals' view, anything other than this bright-line rule would either contradict the Bankruptcy Code or inject uncertainty. *Id.* at 21a, 26a. The court also reasoned that, because trademark law requires a licensor to exercise quality control over the licensee's goods or services, allowing a licensee to continue using the mark would unduly burden the bankruptcy estate. *Id.* at 23a-24a.

Judge Torruella dissented. *Id.* at 29a-34a. He "disagree[d] with the majority's bright-line rule," *id.* at 29a, finding problematic both the majority's statutory interpretation and its policy reasoning. *See id.* at 30a-33a. His dissenting opinion urges an equitable, case-by-case approach for trademark licenses. *Id.* at 34a.

2. The Fourth Circuit follows the same rule as the court of appeals here. See *Lubrizol Enters., Inc.* v. *Richmond Metal Finishers, Inc.*, 756 F.2d 1043 (4th Cir. 1985). *Lubrizol* held that rejection of a patent license under section 365(a) categorically terminates the licensee's rights. *Id.* at 1048. Congress abrogated *Lubrizol* three years later—at least as to patent licenses and other non-trademark licenses—when it enacted section 365(n). But because section 365(n) does not cover trademarks, *Lubrizol* seemingly remains good Fourth Circuit law in a trademark case like this one.

3. The Seventh Circuit takes the opposite approach. See *Sunbeam Prods., Inc.* v. *Chicago Am. Mfg., LLC*, 686 F.3d 372 (7th Cir. 2012). In *Sunbeam*, the Seventh Circuit held that rejection of a trademark license under section 365(a) has no impact on the licensee's right to continue using the mark. *Id.* at 377. Looking to the language of section 365(g), the court observed that rejection of a contract "constitutes a breach of such contract." *Id.* at 376. Thus, although rejection frees the debtor-licensor from performing its contractual obligations, the licensee's rights under the contract remain in place. *Id.*

SUMMARY OF THE ARGUMENT

For the considerable costs it imposes, the rule adopted below provides little benefit. It puts a serious burden on current and future trademark licensees, requiring them to bear the risk of their licensors' potential bankruptcy in exchange for nothing more than a pre-petition damages claim unlikely to ever be paid. The court of appeals' bright-line rule benefits only the small minority of trademark licensors who eventually file for bankruptcy and then choose to reject their license agreements under 11 U.S.C. § 365(a).

For everyone else—including the overwhelming majority of trademark licensors who never go bankrupt or never end up rejecting a license under section 365(a)—the court of appeals' rule creates little but costs and inefficiencies. It makes trademark licenses more difficult and expensive to negotiate, adding unnecessary roadblocks to economically efficient deals that the law should generally incentivize. Worse still, the court of appeals does this on a thin legal foundation. Its analysis misconstrues trademark law, incorrectly assuming that a licensor's obligation to conduct "quality control" over a licensee will necessarily create an undue burden for the bankruptcy estate. The court sides with *Lubrizol*—a stale decision Congress expressly rejected when it enacted section 365(n) in 1988—and does so by making flawed assumptions about Congress' intent. And its decision potentially creates unreasonable results, both in the specific situation where a license covers multiple forms of intellectual property and in the more general sense of incentivizing the strategic use of

bankruptcy to revoke otherwise irrevocable trademark licenses.

These problems stand out because the court did not need to adopt *any* bright-line rule. Congress flagged the intersection between trademark licenses and section 365 as an issue requiring "more extensive study" and "development of equitable treatment . . . by bankruptcy courts." The court of appeals' holding short circuits that equitable development, saddling bankruptcy courts with an inflexible rule that will inevitably produce unjust results.

Until Congress acts, the best rule is not any categorical one, but an equitable approach that considers the facts of each case. The dissenting opinion below urges such an approach, and IPO largely agrees. In IPO's view, bankruptcy courts should start with the Seventh Circuit's *Sunbeam* rule as a presumption—*i.e.*, by presuming that the licensee may elect to continue using the licensed mark. But IPO acknowledges that this result will not always make sense, and sometimes this presumption must cede to other considerations. In those cases, the bankruptcy court should have discretion to craft whatever process or judgment it determines will best serve the equities, taking into account the Bankruptcy Code and its purposes, trademark law, and the terms and context of the parties' license.

ARGUMENT

I. The Court of Appeals' Bright-Line Rule Is Needlessly Restrictive and Problematic.

The court of appeals' "categorical approach" (Pet. App. 27a)—holding that rejection of a trademark license under section 365(a) *always* eliminates the licensee's rights—is troubling. It grafts an inflexible rule onto an area of law that Congress purposefully left open for "more extensive study" and "development of equitable treatment of this situation by bankruptcy courts." S. Rep. No. 100-505, 100th Cong., 2d Sess. 6 (1988). Trademark-licensing issues are highly fact specific. *See id.* at 9 ("[L]icensing arrangements are not generally standardized. Rather, the particular transaction is the product of the circumstances of the licensor, the licensee and other interested parties."); *see also Am. Foods, Inc.* v. *Golden Flake, Inc.*, 312 F.2d 619, 627 (5th Cir. 1963) (noting the "ancient observation that each trade-mark case must be decided upon its own facts"). Yet the decision below adopts an unnecessary "one size fits all" approach, and to no real gain. Neither licensors nor licensees benefit in the long run from this categorical rule.

If adopted by this Court, the court of appeals' rule will add cost and inefficiency to many licensing negotiations, which can already be complicated and expensive. It will do so without indication Congress intended that result, and despite several clear indications to the contrary.

A. Neither Trademark Licensors Nor Licensees Benefit in the Long Run from the Court of Appeals' Rule.

At first blush, the court of appeals' holding appears to unreservedly benefit trademark licensors. It allows them to reclaim unencumbered rights in their

trademarks during bankruptcy, regardless of the negative impact this might have on the licensee or the consuming public. In the court's view, this bright-line rule is necessary to give debtor-licensors a "fresh start." Pet. App. 27a. The opinion also suggests—without authority or substantive analysis—that it will reduce "uncertainty and costs on the parties in bankruptcy proceedings." *Id.*

But the court of appeals' rule comes with significant costs. The most obvious ones fall on the licensee, which must bear the risk of the licensor's potential bankruptcy. If a bankrupt licensor rejects a trademark license under section 365(a), the decision below means the licensee's only recourse is a suit for pre-petition damages. *See* 11 U.S.C. §§ 365(g) and 502(g). A pre-petition damages suit will likely net "minimal" recovery, if any. *In re Crumbs Bake Shop, Inc.*, 522 B.R. 766, 772 (Bankr. D.N.J. 2014) ("[M]onetary recoveries primarily benefit the pre-petition and post-petition lenders and administrative claimants. Minimal distributions to general unsecured creditors are the norm."); *accord In re Matusalem*, 158 B.R. 514, 522 (Bankr. S.D. Fla. 1993) ("Rejection, as contemplated by the Debtor, would lead to the filing of a large damage claim pursuant to Section 365(g) and a new round of litigation over the amount of the claim, with the probable result that the Debtor would be unable to pay the claim."). So the licensee stands to lose both its licensed trademark rights and any realistic chance of being made whole. This result "makes bankruptcy more a sword than a shield, putting debtor-licensors in a catbird seat they often do not deserve." Pet. App. 32a-33a (Torruella, J.,

dissenting) (quoting *In re Exide Techs.*, 607 F.3d 957, 967-968 (3d Cir. 2010) (Ambro, J., concurring)).

The overwhelming majority of trademark licensors will never realize any benefit from the court of appeals' rule. Most trademark licenses do not end with the licensor declaring bankruptcy and rejecting the license. Illustrating the point, this issue has generated only three circuit decisions (one of which, *Lubrizol*, was not even a trademark case). Although the issue is no doubt important, it rests on a factual predicate that does not happen very often—especially when compared to how common trademark-licensing arrangements are. *See, e.g.*, Xuan-Thao N. Nguyen, *Bankrupting Trademarks*, 37 U.C. Davis L. Rev. 1267, 1275-1276 (2004) (explaining that the Lanham Act's enactment in 1946 paved the way for "extensive trademark licensing," which has become a "common practice today").

Meanwhile, the court's categorical rule adds transactional costs and inefficiencies to potentially every negotiation for a trademark license—regardless of whether the licensor ever ends up in bankruptcy. In general, parties enter a trademark license when it creates some sort of net efficiency. *See, e.g.*, *In re XHM Corp.*, 647 F.3d 690, 696 (7th Cir. 2010); Kayvan Ghaffari, *The End to an Era of Neglect: The Need for Effective Protection of Trademark Licenses*, 87 S. Cal. L. Rev. 1053, 1067-68 (2014). Parties should generally be incentivized to reach these efficient arrangements, which can benefit not only the parties but the consuming public at large. *See* Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83

Tex. L. Rev. 1031, 1041 (2005) ("Further, if one postulates that transactions involving intellectual property are costless, society as a whole should benefit, since the owners of intellectual property rights will license those rights to others whenever it is economically efficient to do so."). The decision below has the opposite effect. It forces the potential licensee to consider the ramifications, however distant, of the licensor's possible bankruptcy. And the licensee must consider those ramifications even if the licensor assures its financial stability. Financial circumstances can change quickly, and a rational licensee might not want to risk the consequences of categorical license rejection on mere assurances about the licensor's then-current financial situation.

With the court of appeals' rule, even the vague threat of licensor bankruptcy could chill or derail an otherwise desirable and efficient licensing arrangement. This result is particularly troubling because the licensee is often the one investing most of the capital to produce the licensed goods or services—investments that directly benefit the licensor. *See* 15 U.S.C. §§ 1055 and 1127 (establishing that when a "related company," including a licensee, uses a registered mark or a mark with a pending application for registration, that use inures to the registrant or applicant's benefit); Restatement (Third) of Unfair Competition § 33 cmt. b (1995) (same rule for common law marks). Counterintuitively, then, the licensee in many cases ends up bearing both its own investment risk *and* the risk that the licensor goes bankrupt.

If this Court affirms, the rule adopted here will give many potential licensees and their counsel reason to hesitate. This impacts the licensors, too, adding hurdles to deals that can already be complicated and expensive to complete. *See Sands, Taylor & Wood* v. *Quaker Oats Co.*, 34 F.3d 1340, 1351 (7th Cir. 1994) (emphasizing that licensing negotiations can be "protracted," "expensive," and often "unsuccessful"). And even if these hurdles do not derail the deal completely, the licensee might demand more advantageous terms—for example, a lower royalty rate—to compensate for the risks created by the court of appeals' rule. Or the licensee might insist on an independent audit of the licensor's financial records. Either result harms licensors, who might take little solace in whatever sense of comfort the court of appeals' rule provides. After all, bankruptcy is not the end goal of any rational licensor.

The court of appeals accepts these transactional costs because, in its view, anything but a categorical rule will "increase[] uncertainty and costs on the parties in bankruptcy proceedings." Pet. App. 27a. It is not clear, though, that the court's categorical rule will make bankruptcy proceedings any more efficient. It might just shift the fight into a "new round of litigation" over the licensee's pre-petition damages claim and the debtor's ability to pay it. *See Matusalem*, 158 B.R. at 522. And even accepting *arguendo* the court's premise, its opinion gives no reason to explain why the law should categorically favor more efficient bankruptcy proceedings over more efficient licensing negotiations. "All creditors, to some extent, assume the risk of [the debtor's] bankruptcy." *In re Jartran, Inc.*,

732 F.2d 584, 590 (7th Cir. 1984). The same cannot be said of trademark licensees, who may in many situations reasonably expect that the licensor's financial status will have no bearing on the licensee's ability to continue using the mark. *See* Part I.B, *infra*.

These concerns about the costs of categorical license rejection are not new. Congress itself expressed them when it enacted section 365(n), abrogating the same absolute rule from *Lubrizol* that the court of appeals adopted here. Congress cited the "instability" and "chilling" effects of *Lubrizol*, emphasizing the need for "dependability" and "flexibility" in intellectual property licensing. S. Rep. No. 100-505 at 3-4. Although that legislation did not cover trademarks—there was no pressing need, as *Lubrizol* was a patent case—similar policy concerns apply in the trademark space. *See id.* at 3 ("[*Lubrizol*] threaten[s] an end to the system of licensing of intellectual property . . . that has evolved over many years to the mutual benefit of both the licensor and the licensee and to the country's indirect benefits."); *id.* at 4 (noting the "unique role" of intellectual property in "technological and economic development"); *id.* at 12 (emphasizing the pivotal role of licensing in the "development and commercialization" of products and services).

In its petition-stage briefing, respondent addressed these congressional concerns by making policy distinctions between trademarks and other forms of intellectual property (particularly patents and copyrights). See Opp. 10-11. Yet despite respondent's claim to the contrary, trademarks too play a pivotal role in "encouraging or rewarding innovation." *Id.* at

10. Were it not for trademarks, sellers would have little economic incentive to improve the quality of their offerings, as poor quality would be untraceable to its source. 1 J. Thomas McCarthy, *McCarthy on Trademarks & Unfair Competition* § 2:4 (5th ed. 2018). "Consumers would be unable to recognize high-or low-quality brands, so sales would tend to go to manufacturers who reduced their price by cutting corners on quality. The result would be a race to produce inferior products, rather than competition to produce better ones." *Id.* (quoting Richard Craswell, FTC Office of Policy Planning, *Trademarks, Consumer Information & Barriers to Competition* 7 (1979)).

In the long run, the court of appeals' rule will create costs and inefficiencies outweighing any benefits to licensors or the bankruptcy process. Were it clear Congress intended that result, the decision below might stand on solid ground. But that is far from clear, and if anything, the statutory text and history suggest just the opposite. *See* Part I.D, *infra*.

B. The Court of Appeals Relied on Misguided Concerns About a Licensor's Quality-Control Obligations.

The decision below rests heavily—if not entirely—on one premise: that allowing a trademark licensee to retain its licensed rights will unacceptably burden the bankruptcy estate because the debtor-licensor must exercise quality control over the licensee's goods or services. *See* Pet. App. 22a-27a. This premise drove the majority's rejection of *Sunbeam*, *see id.* at 27a, and its rejection of the dissenting opinion's equitable, case-by-case approach, *see id.* at 26a. But the majority's

premise is faulty. It misinterprets trademark law, overstating and overgeneralizing what it means for a licensor to conduct quality control under a trademark license.

When a trademark owner licenses its mark to others, it has a duty to ensure consistent quality. 3 McCarthy, *supra*, § 18:42. This does not necessarily mean "high" quality—the quality simply must be consistent. *Id.* § 18:55 ("[C]ustomers are entitled to assume that the nature and quality of goods and services sold under the mark at all licensed outlets will be consistent and predictable."). Licensing without quality control is known as "naked licensing" and, in certain situations, can cause the mark to lose its significance as a source identifier. *Id.* § 18:48. If this happens, a court may deem the owner to have abandoned the mark. *I.*; *accord Patsy's Italian Rest., Inc.* v. *Banas*, 658 F.3d 254, 264 (2d Cir. 2011).

"[O]nly minimal quality control" is typically needed to avoid these consequences. *Kentucky Fried Chicken Corp.* v. *Diversified Packaging Corp.*, 549 F.2d 368, 387 (5th Cir. 1977). As a practical matter, "[c]ourts will generally find abandonment through naked licensing only in extreme cases in which the trademark owner exercises no control whatsoever." *Paleteria La Michoacana, Inc.* v. *Productos Lacteos Tocumbo S.A. DE C.V.*, 188 F. Supp. 3d 22, 92 (D.D.C. 2016). Absent a "significant deviation" from the licensor's quality standards, the licensor generally will not lose its mark. *TMT N. Am., Inc.* v. *Magic Touch GmbH*, 124 F.3d 876, 886 (7th Cir. 1997). And as a corollary, courts uniformly hold that abandonment by naked licensing

requires a "stringent" showing of proof. *E.g.*, *Doeblers' Penn. Hybrids, Inc.* v. *Doebler*, 442 F.3d 812, 824 (3d Cir. 2006); *Tumblebus Inc.* v. *Cranmer*, 399 F.3d 754, 765 (6th Cir. 2005); *Creative Gifts, Inc.* v. *UFO*, 235 F.3d 540, 548 (10th Cir. 2000); *TMT N. Am.*, 124 F.3d at 884 (7th Cir. 1997); *Taco Cabana Int'l, Inc.* v. *Two Pesos, Inc.*, 932 F.2d 1113, 1121 (5th Cir. 1991), *aff'd* 505 U.S. 762 (1992).

Just as important, adequate quality control "varies with the circumstances." *Edwin K. Williams & Co.* v. *Edwin K. Williams & Co.-E.*, 542 F.2d 1053, 1060 (9th Cir. 1976). There is no black-letter rule requiring any particular type or level of control. *See Eva's Bridal Ltd.* v. *Halanick Enters.*, Inc., 639 F.3d 788, 791 (7th Cir. 2011) ("How much authority is enough can't be answered generally; the nature of the business, and customers' expectations, both matter."). The agreement's terms are highly relevant, as courts might be "reluctant to interfere with reasonable quality control arrangements agreed to by the parties." 3 McCarthy, *supra*, § 18:48. Another important consideration is the type of goods or services being licensed—to give one example, consumers may expect greater quality consistency from a restaurant

franchise[3] than they expect from licensed merchandise for their favorite sports team.[4]

These considerations are far from exhaustive. The dispositive question is whether the licensee's use of the mark would "deceive[]" consumers because of "variant quality standards." *Taco Cabana*, 932 F.3d at 1121. This question does not "elevate form over substance." *Id.* It requires courts to examine "the expectations that the licensee's use of the mark creates in consumers and the supervision that is reasonably necessary to insure that those expectations are not endangered." Restatement (Third) of Unfair Competition § 33 & cmt. c (endorsing a "flexible" quality-control standard "responsive to the particular facts of each case").

With these principles in mind, the court of appeals' decision is difficult to defend. It treats quality control as an invariably demanding burden requiring significant affirmative conduct from every licensor.

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[3] Franchisors often offer a "complete method of doing business," controlling the franchisee's real-estate premises and supplying the franchisee's products. David M. Jenkins, *Licenses, Trademarks, and Bankruptcy, Oh My!: Trademark Licensing and the Perils of Licensor Bankruptcy*, 25 J. Marshall L. Rev. 143, 143 n.1 (1991).

[4] The National Football League, for example, has granted licenses "allowing [team] logo[s] to be used by *hundreds* of manufacturers, distributors, sponsors, etc. in connection with their respective business operations." *Bouchat* v. *Baltimore Ravens Ltd. P'ship*, 619 F.3d 301, 313 (4th Cir. 2010) (emphasis added). It would not be feasible for the NFL to ensure perfectly consistent quality across these hundreds of licensees, and there is no reason to think consumers expect that level of control.

See Pet. App. 24a-27a. It overstates the typically "minimal" quality control required by trademark law. *Kentucky Fried Chicken*, 549 F.2d at 387, while also overgeneralizing the case-by-case question of what it means to conduct adequate quality control. In doing so, the court's analysis rests on speculation, stating without authority that (1) the quality-control obligation "will likely often be greater than normal" in bankruptcy because the licensor and licensee might be "at odds" with each other; (2) regardless of whether the licensor and licensee are actually at odds with each other, "in all cases there will be some burden;" and (3) it will usually be impossible to know "how great the burden will prove to be" because it will depend on the acts of the licensee. Pet. App. 26a.

This speculative reasoning is problematic for at least two reasons. First, it fails to recognize that "there are already incentives for licensees to maintain the licensor's quality control provisions" even where the licensor files a bankruptcy petition. Jenkins, 25 J. Marshall L. Rev. at 163-64 ("[T]he mechanism of market forces and the anti-fraud laws make it highly unlikely that licensees will abandon the quality standards to which they originally agreed."). Second, and more importantly, it disregards numerous cases where courts declined to find abandonment by naked licensing *even though* the licensor exercised little (or no) actual control over the licensee. Abandonment requires more than just a lack of action by the licensor—it requires consumer deception arising from variant quality. *See Exxon Corp.* v. *Oxxford Clothes, Inc.*, 109 F.3d 1070, 1079-80 (5th Cir. 1997) ("[I]f a trademark has not ceased to function as an indicator

of origin there is no reason to believe that the public will be misled; under these circumstances, neither the express declaration of Congress's intent in [15 U.S.C.] § 1127(2) nor the corollary policy considerations which underlie the doctrine of naked licensing warrant a finding that the trademark owner has forfeited his rights in the mark.").

For example, a licensor may avoid abandonment where it merely approves samples of the licensed goods before entering the licensing agreement, so long as the licensee agrees to maintain the same level of quality during the life of the license. *See Glow Indus., Inc.* v. *Lopez*, 273 F. Supp. 2d 1095, 1110 (C.D. Cal. 2003); *Embedded Moments, Inc.* v. *Int'l Silver Co.*, 648 F. Supp. 187, 194 (E.D.N.Y. 1986). Likewise, abandonment is unlikely if the licensor justifiably relies on its licensee's established expertise to maintain quality based on the parties' previous dealings, *see Transgo, Inc.* v. *Ajac Transmission Parts Corp.*, 768 F.2d 1001, 1017-1018 (9th Cir. 1985), the licensee's lengthy experience in a particular industry, see *Syntex Labs., Inc.* v. *Norwich Pharmacal Co.*, 315 F. Supp. 45, 56 (S.D.N.Y. 1970), or the absence of consumer complaints regarding the quality of the licensed product, *see Land O'Lakes Creameries, Inc.* v. *Oconomowoc Canning Co.*, 330 F.2d 667, 670 (7th Cir. 1964). A licensor may also rely on its licensee to maintain quality where a special relationship exists between the two. *See Hokto Kinoko Co.* v. *Concord Farms, Inc.*, 738 F.3d 1085, 1098 (9th Cir. 2013) (licensee was a wholly owned subsidiary of the licensor); *Doeblers' Penn.*, 442 F.3d at 824 (licensee and licensor were family members); *Stock Pot Rest.*,

Inc. v. *Stockpot, Inc.*, 737 F.2d 1576, 1580 (Fed. Cir. 1984) (licensee worked as licensor's "right hand" employee).

"Since the implementation of the Lanham Act, courts have adopted an increasingly broad interpretation of quality control and accepted almost any evidence to declare licensing valid." Irene Calboli, *The Sunset of "Quality Control" in Modern Trademark Licensing*, 57 Am. U. L. Rev. 341, 389 (2007). The court of appeals' rule disregards this, heavily emphasizing concerns about a duty that often imposes minimal burden on the licensor. Those concerns form too slender a reed on which to base a categorical rule with such serious consequences.

C. The Court of Appeals' Rule Creates Potentially Unreasonable Results.

Though not addressed by the court of appeals or in the parties' petition-stage briefing, the decision below leads to potentially unreasonable results. One of these results arises in the not-uncommon situation where a licensed asset is both a trademark *and* a copyrighted work. *See* 1 McCarthy, *supra*, § 6:17.50 ("[T]here is no reason why a given work cannot be the subject of both trademark and copyright protection."). Pictures and designs, for example, can receive both trademark and copyright protection. *Id.* § 6:18. This dual protection

may extend to logos,[5] the design of physical products[6] and their packaging,[7] periodical covers,[8] and fictional characters[9]—to name just a few examples.

The court of appeals' rule creates a conflict for these dual-protected assets. If a debtor-licensor rejects a license for a dual-protected asset under section 365(a), the licensee would then have the statutory option to

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[5] *See, e.g.*, *Jada Toys, Inc.* v. *Mattel, Inc.*, 518 F.3d 628, 632-634, 637 (9th Cir. 2008) (reversing and remanding for consideration of claims for trademark and copyright infringement of HOT WHEELS logos); *City of Carlsbad* v. *Shah*, 850 F. Supp. 2d 1087, 1100, 1111 (S.D. Cal. 2012) (finding trademark and copyright protection for a city's logo).

[6] *See, e.g.*, *Kurt S. Adler, Inc.*, v. *World Bazaars, Inc.*, 897 F. Supp. 92, 95-97 (S.D.N.Y. 1995) (finding trademark and copyright protection for design of Christmas tree ornament); *Animal Fair, Inc.* v. *Amfesco Indus., Inc.*, 620 F. Supp. 175, 186-188, 190-191 (D. Minn. 1985), *aff'd*, 794 F.2d 678 (8th Cir. 1986) (same result; design of novelty slipper).

[7] *See, e.g.*, *Carol Cable Co.* v. *Grand Auto, Inc.*, 4 U.S.P.Q.2d 1056, 1061-62 (N.D. Cal. 1987) (finding trademark and copyright protection for packaging of battery-booster cables)

[8] *See, e.g.*, *Reader's Digest Ass'n, Inc.* v. *Conservative Digest, Inc.*, 821 F.2d 800, 803-06 (D.C. Cir. 1987) (affirming trademark and copyright protection for *Reader's Digest* magazine cover).

[9] *See, e.g.*, *Warner Bros. Entm't, Inc.* v. *X One X Prods.*, 840 F.3d 971, 975-76, 979-80 (8th Cir. 2016) (affirming trademark and copyright protection for characters from *Gone With the Wind*, *The Wizard of Oz*, and *Tom and Jerry*); *Walt Disney Co.* v. *Powell*, 698 F. Supp. 10, 11-13 (D.D.C. 1988), *aff'd in relevant part*, 897 F.2d 565 (D.C. Cir. 1990) (same result; Mickey Mouse and Minnie Mouse).

"retain its rights , , , under [the license]." 11 U.S.C. § 365(n)(1)(B). This is because copyrights are one of the enumerated forms of "intellectual property" in section 101(35A). Yet under the court of appeals' rule, that same licensee would simultaneously be *prohibited* from retaining its licensed rights, because the asset is also a trademark. Any commercial use of the asset would be subject to a claim of trademark infringement by the (former) licensor, even though the licensee retains a continuing copyright license for the exact same asset. This result would render the licensee's section 365(n) election basically meaningless.

Another unreasonable result stems from the potentially bad incentives created by the decision below. Many trademark licenses—including the one in this case—are irrevocable. *E.g.*, Pet. App. 121a; *see also* Raymond T. Nimmer & Jeff C. Dodd, *Modern Licensing Law* § 9:17 (2018) (noting common situations in which licenses are "irrevocable or perpetual"). As the Seventh Circuit noted in *Sunbeam*, a licensor cannot revoke an irrevocable license simply by breaching its own obligations. *See* 686 F.3d at 376. The decision here creates an escape hatch, allowing a licensor to revoke an otherwise irrevocable license by filing for bankruptcy and then rejecting the license agreement under section 365(a). If affirmed, the decision could incentivize bankruptcy proceedings for licensors who enter a license and then later regret it, increasing the bankruptcy courts' caseload while also "stripping innocent licensee[s] of rights central to the operations of their ongoing business." S. Rep. No. 100-505 at 4.

This incentive is quite real. In *Lubrizol*, for example, the debtor-licensor rejected the license under section 365(a) precisely because it hoped to "facilitate sale or [future] licensing of the technology unhindered by the restrictive provisions in the [existing] license." 756 F.2d at 1045. Other cases reflect similar strategic bankruptcy filings to escape trademark licenses.[10] Congress alluded to this incentive when it rejected *Lubrizol* by enacting section 365(n). *See* S. Rep. No. 100-505 at 2-3 ("[S]ince rejection results in valuable rights apparently reverting to the bankruptcy estate—rights which the bankruptcy estate otherwise would have to share with the licensee—rejection will nearly always be arguably beneficial to the bankruptcy estate."); *see also* 133 Cong. Rec. S11651-01 (1987) (statement of Sen. DeConcini: "[T]he licensor can obtain a much higher royalty if he enters into an exclusive license with another party . . . even though such a decision could effectively doom the licensee's business. . . . This is the kind of scenario this legislation is designed to prevent.").

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[10] *See, e.g.*, *In re SIMA Int'l, Inc.*, No. 17-21761 (JJT), 2018 WL 2293705, at *10 n.29 (Bankr. D. Conn. May 17, 2018) (emphasizing that the debtor-licensor sought Chapter 11 reorganization after "continuously [seeking], prepetition, to avoid or otherwise terminate . . . the License Agreement" through a non-bankruptcy litigation and then through arbitration); *Matusalem*, 158 B.R. at 522 (finding that the debtor-licensor had filed for Chapter 11 reorganization with the "ineluctably clear" purpose of terminating a sub-franchise agreement that it had been unable to terminate through prior, non-bankruptcy litigation).

Respondent's brief in opposition suggests that this worrying incentive is all part of Chapter 11's "fundamental rehabilitative nature." Opp. 9-10, 13. It is true, of course, that bankruptcy proceedings can allow a debtor to discharge certain burdens. But rejecting a license agreement "is not 'the functional equivalent of a rescission'" or an avoiding power, which the Bankruptcy Code allows in some other contexts. *Sunbeam*, 686 F.3d at 377 (quoting *Thompkins* v. *Lil' Joe Records, Inc.*, 476 F.3d 1294, 1306 (11th Cir. 2007), and citing 11 U.S.C. § 544-551 as examples). In most cases, categorical rejection of a trademark license will negatively impact the licensee far more than it will benefit the debtor-licensor by reducing any real quality-control burden. *See* Part I.B, *supra*. And in those rarer cases where this calculus comes out the other way, the case-by-case approach IPO recommends below will allow the bankruptcy court to weigh those equities and craft appropriate solutions. *See* Part II, *infra*.

D. The Court of Appeals Relied on Incorrect Assumptions—Disproved by the Statutory Text and the Legislative History—About Congress' Intent.

The court of appeals' opinion appears to suggest that Congress would endorse its bright-line rule. *See* Pet. App. 22a. It emphasizes that Congress' "principal aim" in allowing rejection of executory contracts under section 365(a) is to "release the debtor's estate from burdensome obligations that can impede a successful reorganization." *Id.* (quoting *NLRB* v. *Bildisco & Bildisco*, 465 U.S. 513, 528 (1984)). Although that is

true, the court's resulting inference—that a trademark owner's quality-control obligation will necessarily impede a successful reorganization (*see* Pet. App. 23a-27a)—is not. *See* Part I.B, *supra*.

Nothing in section 365(n)'s text or history suggests that Congress agreed with that inference. To the contrary, Congress expressly declined to opine on the issue when it amended the statute to reject *Lubrizol*. *See* S. Rep. No. 100-505 at 6 (explaining that trademark licenses and the quality-control rule "could not be addressed without more extensive study," and that those issues were "beyond the scope of this legislation").[11] Had Congress intended a bright-line rule for trademarks, it could have easily enacted one. *See, e.g.*, *SAS Inst., Inc.* v. *Iancu*, 138 S. Ct. 1348, 1356 (2018) ("[I]f Congress wanted to adopt the [respondent's] approach it knew exactly how to do so."). Instead, it left trademarks out of section 365(n) entirely, gave a clear and explicit reason for that decision, and invited "equitable treatment of the situation by bankruptcy courts." S. Rep. No. 100-505 at 6.

Despite all this, the decision below concludes that Congress did *not* intend to allow equitable treatment of this situation. *See* Pet. App. 24a-26a (suggesting

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[11] A statutory change is an alternative way to set forth how trademark licenses are handled in bankruptcy, however the congressional record expressly left the handling of trademark licenses subject to current law and for the courts to apply.

that Congress wants bankruptcy courts to exercise their equitable powers only in specific, statutorily enumerated situations). This reasoning sweeps aside Congress' express invitation for bankruptcy courts to treat the issue equitably until further congressional action. It also disregards that bankruptcy courts have broad equitable powers, which they may freely exercise so long as the Bankruptcy Code contains no "specific prohibition" against a particular action. *Law* v. *Siegel*, 571 U.S. 415, 421 (2014); *see* 11 U.S.C. § 105(a) ("The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."). This only makes sense—Congress could not realistically legislate every possible fact pattern, so the courts must have discretion to reach fair results by relying on precedent, expertise, and experience.

"[I]t is not the role of the courts to legislate . . . through the creation of bright-line rules in the face of congressional intent." Pet. App. 33a (Torruella, J., dissenting). The court of appeals did just that. Its categorical rule creates unnecessary costs, inefficiencies, and potentially unreasonable results—none of which Congress intended.

II. Until Congress Acts, the Best Rule for Trademark Licenses Is an Equitable, Case-by-Case Approach with a Presumption in Favor of the Licensee's Rights.

At some point, Congress might enact legislation addressing rejection of trademark licenses under section 365. Until then, any bright-line rule is inappropriate and unnecessary. Instead, IPO

recommends that this Court adopt an equitable, case-by-case approach like the one urged by Judge Torruella's dissenting opinion. *See* Pet. App. 29a-34a. As explained below, IPO suggests one key addition: bankruptcy courts should start by presuming that, in most cases, it will be equitable to allow the licensee to continue using the mark. But if the court finds that result inequitable in a particular case, it should have broad discretion to craft a different solution.

A. Courts Should Start with *Sunbeam*'s Rule as a Presumption, but Then Consider Whether Case-Specific Factors Overcome That Presumption.

Because Congress has yet to legislate the issue, the dissent below correctly explains that courts should view rejection of a trademark license "through the broader lens of section 365." Pet. App. 32a. Under the general provision in section 365(g), rejection of a trademark license merely "constitutes a breach of such contract," 11 U.S.C. § 365(g), the effect of which is to free the debtor-licensor from its contractual obligations. But that still leaves unanswered the key question: what happens to the licensee's contractual rights (*i.e.*, its right to continue using the mark)?

Sunbeam provides a helpful, though incomplete, answer. As that decision explains, a licensor outside of bankruptcy obviously cannot use its own breach to "terminate [the] licensee's right[s]." *Sunbeam*, 686 F.3d at 376. In IPO's view, this basic principle should be the starting point. Because rejection is a breach, 11 U.S.C. § 365(g), the law should presume that rejection

does *not* terminate the licensee's rights—the same as with any other breach.

Sunbeam was content to stop there. *See* 686 F.3d at 376-77. However, IPO acknowledges that the situation is more nuanced than *Sunbeam* suggests. A licensor in bankruptcy has different legal rights than a licensor outside bankruptcy. Congress authorized rejection precisely because it can sometimes relieve the bankruptcy estate from "burdensome obligations that can impede a successful reorganization." *Bildisco*, 465 U.S. at 528. Although usually unlikely, *see* Part I.B, *supra*, some licensing arrangements may require a level or type of quality control that impedes the debtor-licensor from successfully reorganizing. *Sunbeam* does not work in those situations.

IPO thus recommends an equitable approach that starts with *Sunbeam* but adds one more step. Bankruptcy courts should presume that, in most cases, it is appropriate to allow the licensee to continue using the mark (*i.e.*, the *Sunbeam* rule). But courts should then consider whether any case-specific factors compel a different conclusion. This factor-based analysis should focus on determining the actual burden to the bankruptcy estate, if any, of conducting quality control over the licensee. Although not exhaustive or mandatory, the following factors might be relevant to answering that question:

- The terms of the license agreement, particularly the specified quality-control obligations and responsibilities of each party. *See* pp. 15-17, *supra*.

- The type of goods or services offered under the license, and how that may affect consumers' expectations for quality consistency. *See* p. 15-17, *supra*.

- Evidence of variant quality and consumer deception, if any. See p. 17, *supra*.

- The nature of the parties' relationship, including the context in which they entered into the license and whether they have any special relationship. *See* pp. 17-18, *supra*.

- The length and history of the licensing relationship, including the history of actual quality-control efforts by the licensor and of quality compliance by the licensee. *See* pp. 17-18, *supra*.

- Whether the licensee is well-established in the industry, and relatedly, whether the licensor can justifiably rely on the licensee's established expertise to maintain quality. *See* pp. 17-18, *supra*.

- Whether the licensed mark is also protected by copyright law and covered by a copyright license. If so, termination could lead to unreasonable results. *See* Part I.C, *supra*.

- Whether the licensee is the only party using the mark. If so, terminating the license could result

in abandonment of the mark. *See* 15 U.S.C. § 1117 (establishing that a mark is abandoned if "its use has been discontinued with intent not to resume such use").

- Whether the license covers any non-trademark intellectual property used in conjunction with the licensed mark (for example, patented products sold under the mark). If so, termination of the trademark license could mislead consumers, as the licensee would have to sell the patented product under a different mark.

- Any other prejudice to the licensee if it could no longer use the mark.

- Any other prejudice or benefit to creditors or other interested parties. For example, if the licensee pays a royalty, continuing the license could benefit the bankruptcy estate and facilitate future distributions to creditors.

- The amount of investment and expense the licensee has made to build and develop the brand equity associated with the licensed trademarks.

If these factors (or whatever others the court might consider) lead to the conclusion that continuing the license would unreasonably burden the bankruptcy estate, the court should terminate the licensee's rights.

The licensee may then bring a pre-petition damages claim under section 365(g).

B. The Approach Urged Here Strikes the Best Balance Between Various Interests.

Unlike the decision below (which categorically favors licensors) or the Seventh Circuit's approach in *Sunbeam* (which categorically favors licensees), IPO's suggested approach attempts to strike a balance. It avoids the unnecessary costs and inefficiencies of the court of appeals' rule—plus the serious harm that rule can inflict on licensees—while still paying mind to the debtor-licensor's interests and potential burdens. It also respects the various and sometimes competing purposes of bankruptcy law, trademark law, and contract law, all of which intersect in this type of case. *Compare* Pet. App. 27a (maj. op.) (emphasizing Chapter 11's goals of facilitating distribution to creditors while protecting the debtor's "fresh start options"), *with id.* at 34a (Torruella, J., dissenting) (emphasizing the need to consider "the terms of the Agreement[] and non-bankruptcy law").

IPO's approach also comports best with Congress' intent. It tracks Congress' purposeful decision not to legislate trademark licenses with the 1988 statutory amendment, instead inviting "more extensive study" and "development of equitable treatment." S. Rep. No. 100-505 at 6. It considers the negative economic effects and potentially unreasonable results arising from categorical license rejection, *see* Parts I.A and I.C, *supra*, but also acknowledges that trademark licenses "depend to a large extent on control of the quality of the products or services." S. Rep. No. 100-505 at 6.

Finally, the approach urged here reflects the nuanced contours of trademark law's quality-control obligation. *See* Part I.B, *supra*. It favors protecting the licensee—which usually makes sense given the licensor's often "minimal" burdens, *Kentucky Fried Chicken*, 549 F.2d at 387—while still allowing bankruptcy courts ample room to reach a different result if the equities call for it.

CONCLUSION

The court of appeals' judgment should be reversed and the case remanded for further proceedings.

Respectfully submitted,

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DECEMBER 12, 2018

APPENDIX

APPENDIX[1] — MEMBERS OF THE BOARD OF DIRECTORS INTELLECTUAL PROPERTY OWNERS ASSOCIATION

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1. IPO procedures require approval of positions in briefs by a two-thirds majority of directors present and voting.

Appendix

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No. 17-1657

IN THE

Supreme Court of the United States

MISSION PRODUCT HOLDINGS, INC.,

Petitioner,

v.

TEMPNOLOGY, LLC, N/K/A OLD COLD LLC,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

AMICUS CURIAE BRIEF OF THE INTERNATIONAL TRADEMARK ASSOCIATION IN SUPPORT OF PETITIONER

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AMICUS CURIAE BRIEF OF THE INTERNATIONAL TRADEMARK ASSOCIATION IN SUPPORT OF PETITIONER

The undersigned *amicus curiae* respectfully submits this brief in support of Petitioner Mission Product Holdings, Inc. and urges reversal of the decision below in *In re Tempnology, LLC*, 879 F.3d 389 (1st Cir. 2018).[1]

INTEREST OF THE *AMICUS CURIAE*

Founded in 1878, *amicus curiae* The International Trademark Association (INTA) is a not-for-profit organization dedicated to the support and advancement of trademarks and related intellectual-property concepts as essential elements of trade and commerce. INTA has more than 7,200 members in 191 countries. Its members include trademark owners as well as law firms and other professionals who regularly assist brand owners in the creation, registration, protection, and enforcement of their trademarks. All INTA members share the goal of promoting an understanding of the essential role that trademarks play in fostering

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[1] Both Petitioner and Respondent have provided written consent to INTA's filing of this brief. This brief was authored solely by INTA and its counsel. No party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, and its counsel made such a monetary contribution to its preparation or submission. *See* S. Ct. R. 37.6.

effective commerce, fair competition, and informed decision-making by consumers.

INTA (formerly known as the United States Trademark Association) was founded in part to encourage the enactment of federal trademark legislation after the invalidation on constitutional grounds of the United States' first trademark act. Since then, INTA has been instrumental in making recommendations and providing assistance to legislators in connection with major trademark legislation. INTA has participated as *amicus curiae* in numerous cases involving significant trademark issues.[2] INTA members are frequent participants in

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[2] Cases in which INTA has filed *amicus* briefs include: *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC*, 138 S. Ct. 2707 (petition for certiorari granted Jun. 28, 2018); *Matal v. Tam*, 137 S. Ct. 1744 (2017); *Hana Fin., Inc. v. Hana Bank*, 135 S. Ct. 907 (2015); *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293 (2015); *Pom Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228 (2014); *Already, LLC v. Nike, Inc.*, 568 U.S. 85 (2013); *KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111 (2004); *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003); *Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418 (2003); *TrafFix Devices, Inc. v. Mktg. Displays, Inc.*, 532 U.S. 23 (2001); *Wal-Mart Stores, Inc. v. Samara Bros.*, 529 U.S. 205 (2000); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999); *Dickinson v. Zurko*, 527 U.S. 150 (1999); *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159 (1995); *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763 (1992); *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281 (1988); *Shammas v. Focarino*, 784 F.3d 219 (4th Cir. 2015); *Ferring B.V. v. Watson Labs., Inc.-Fla.*, 764 F.3d 1382 (3d Cir. 2014); *Christian Louboutin S.A. v. Yves Saint Laurent Am. Holding, Inc.*, 696 F.3d 206 (2d Cir.

licensing arrangements, and are often parties in trademark-related litigation as both plaintiffs and defendants. INTA members also are often parties in bankruptcy proceedings, as both debtors and creditors.

INTA and its members have a particular interest in this case, which presents the question of whether a debtor-licensor's rejection of an executory trademark license agreement in bankruptcy inevitably results in the agreement's ***complete termination***.[3] If so, rejection not only would have the effect of freeing the debtor from any continuing contractual obligations, but also would ***terminate***

2012); *Rosetta Stone Ltd. v. Google, Inc.*, 676 F.3d 144 (4th Cir. 2012); *Fleischer Studios, Inc. v. A.V.E.L.A.*, Inc., 654 F.3d 958 (9th Cir. 2011); *Levi Strauss & Co. v. Abercrombie & Fitch Trading Co.*, 633 F.3d 1158 (9th Cir. 2011); *Chloe v. Queen Bee of Beverly Hills, LLC*, 616 F.3d 158 (2d Cir. 2010); *Starbucks Corp. v. Wolfe's Borough Coffee, Inc.*, 588 F.3d 97 (2d Cir. 2009); *ITC Ltd. v. Punchgini, Inc.*, 482 F.3d 135 (2d Cir. 2007); *Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC*, 507 F.3d 252 (4th Cir. 2007); *Test Masters Educ. Servs., Inc. v. Singh*, 428 F.3d 559 (5th Cir. 2005).

[3] Section 365 of the Bankruptcy Code only applies to license agreements that qualify as executory contracts. *See, e.g., Lewis Bros. Bakeries Inc. v. Interstate Brands Corp.*, 751 F.3d 955, 962 (8th Cir. 2014) (an executory contract is "a contract under which the obligation of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other" (citation omitted)). Not all trademark license agreements are executory. Accordingly, for the purpose of this *amicus* brief, INTA is only addressing executory trademark license agreements.

the licensee's right to continue to use the trademark and would effectively claw back the trademark rights the licensor had licensed. That is the position of the First Circuit, which revives the flawed proposition that rejection constitutes complete termination, a proposition previously associated with the largely discredited decision in *Lubrizol Enters., Inc. v. Richmond Metal Finishers, Inc.*, 756 F.2d 1043 (4th Cir. 1985). The alternative position, advanced by Petitioner and supported by INTA, is that rejection of a trademark license agreement may well result in ***termination of the licensor's obligations and a corresponding breach of the agreement by the licensor***, but it ***does not terminate the licensee's right to continue to use the licensed trademark***. This is the rule properly adopted by the Seventh Circuit in *Sunbeam Prods, Inc. v. Chi. Am. Mfg., LLC*, 686 F.3d 372 (7th Cir. 2012).

The question presented, which is the most significant unresolved legal issue in trademark licensing, has led to uncertainty in the market for trademark licenses, an uncertainty that the First Circuit's decision exacerbates. Because parties to a trademark license agreement do not know whether the agreement might be at risk of termination in a licensor's bankruptcy, they often must negotiate complex provisions to manage or allocate that risk.

This uncertainty has an adverse effect on the broader business community. Trademarks are the most widely used form of registered intellectual property. World Intellectual Property Organization, WORLD INTELLECTUAL PROPERTY REPORT: BRANDS – REPUTATION AND IMAGE IN THE GLOBAL MARKETPLACE 9 (2013). Trademark rights thus are often among a debtor's key assets. Not surprisingly, therefore, the treatment of the debtor's licenses of those rights is an issue that arises frequently in the bankruptcy context.

Reversal of the First Circuit's decision and uniform application of the *Sunbeam* rule would facilitate restructuring for debtors in bankruptcy, provide certainty for all parties, enhance the value of trademark licenses in the pre-bankruptcy context, and help trademarks better perform their core function of guiding consumers to the products and services they want, with reliable assurances of source and quality. By contrast, affirming the First Circuit's decision would negatively affect the value of trademark license agreements, to the detriment of licensors, licensees, and consumers.

SUMMARY OF ARGUMENT

This Court should reverse the First Circuit's decision and adopt the rule articulated by the Seventh Circuit in *Sunbeam*, which held that a debtor-licensor's rejection of an executory trademark license agreement is not a termination of the license agreement but, rather, is a breach of the licensor's obligations under that agreement. Under that rule, the trademark licensee is entitled to continue to use the trademark under the terms of the rejected agreement; these terms may provide for continuing payments to the licensor and may restrict the extent to which the licensee may use the licensed mark, including the goods or services with which the mark can be used, the jurisdictions in which the mark can be used, and the duration of the licensee's use of the mark. The *Sunbeam* rule promotes the strength and stability of the trademark system for the benefit of all participants and, ultimately, for consumers.

In the decision below, the First Circuit held that a debtor-licensor's right to "reject" executory contracts—to eliminate contractual obligations that may interfere with its restructuring—has the consequence of terminating the licensee's right to use the licensed trademark.

Other courts have taken a different approach: They have held that the licensor's rejection of a trademark license agreement does not terminate the ***licensee's*** right to continue to use the trademark in

accordance with the agreement. Rather, the debtor-licensor's rejection simply excuses the ***licensor's*** contractual obligations under the agreement, but does not terminate the agreement. For example, the licensor would no longer be obligated to undertake or fund enforcement efforts against infringers of the licensed mark or defend third-party infringement claims brought against the licensee; those rejected tasks constitute a breach of contract, for which the licensee may have an unsecured claim in the bankruptcy (and, in some cases, the ability to mitigate its damages by pursuing those actions on its own). These courts have concluded that the rule that governs a debtor's rejection of other executory agreements (which excuses the debtor's obligations and gives its counter-party an unsecured claim for breach of contract) should apply equally to the rejection of a trademark license agreement.

The Court should hold that the *Sunbeam* rule is the most equitable approach to reconciling the interest of licensors and licensees in bankruptcy and establishing a stable market for trademark licenses. Such a rule enhances the value of trademark licenses and promotes the stability of both trademark law and bankruptcy principles:

- Licensors benefit because licensees will pay more up front or in royalties for licensed rights that are likely to survive a potential bankruptcy filing by the licensor.

- Licensees, who have substantial reliance interests in the licensed trademarks (*e.g.*, having hired employees and/or established manufacturing capacity to take advantage of the rights), will not suddenly find their rights invalidated by the licensor's termination of a trademark license agreement.

- Above all, the American public will be better off. The ultimate beneficiary of a strong trademark system is the consumer, who can rely on healthy trademarks as sound indicators of source and quality. William M. Landes and Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 J. LAW AND ECON. PERSP. 265, 270 (1987).

The *Sunbeam* approach also is consistent with bankruptcy law and policy. Section 365 of the Bankruptcy Code provides a debtor with a right to reject an executory contract and allows it to extinguish its onerous contractual obligations, such as equipment lease payments or contracts to provide services. It also provides that rejection constitutes a pre-petition breach of the contract, which has the same effect on the counter-party as a breach outside of bankruptcy. Section 365 has never been intended to be a vehicle for a debtor to recover, through the artifice of rejection, legal rights it had granted pre-

petition, which is what the First Circuit's approach would allow. Adopting the *Sunbeam* rule, therefore, would be consistent with general bankruptcy policies that govern the rejection of other executory contracts under which the rejected contract is not terminated and the counter-party retains its rights in accordance with applicable non-bankruptcy law.

INTA urges the Court to reverse the First Circuit's decision and adopt the rule in *Sunbeam*.

ARGUMENT

I. A Rule That Best Promotes the Strength and Stability of the Trademark System Will Benefit the U.S. Economy and the Bankruptcy System.

A. The Law of Trademarks and Trademark Licensing.

A trademark is a designation used to identify and distinguish the source of goods and services of a person or company. *Matal v. Tam*, 137 S. Ct. 1744, 1751 (2017) (citing *B & B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 1299 (2015)). Under the Lanham Act (the "Act"), a trademark owner can validly license a trademark or service mark to another to use. *See* 15 U.S.C. § 1055 (providing that "related companies" can use mark); 15 U.S.C. § 1127 ("'related companies' means any person whose use of a mark is controlled by the owner of the mark with respect to the nature or quality of the goods or

services on or in connection with which the mark is used"). Because a licensed use must meet the quality levels set by the trademark license agreement, consumers can trust that products or services marketed under particular marks will meet an expected level of quality.

In order to protect consumers, the Act requires that the licensor exercise control over the nature and quality of the goods and/or services sold by the licensee under the licensed mark. A license granted without any such quality control is deemed a "naked license" because it is lacking in a necessary condition for the validity of a license agreement. *See Societe Comptoir de L'Industrie Cotonniere Etablissements Boussac v. Alexander's Dep't Stores, Inc.*, 299 F.2d 33, 35 (2d Cir. 1962) (naked licensing is a form of fraud on the public). Naked licensing by a trademark owner can lead to invalidation of the trademark. *Barcamerica Int'l USA Tr. v. Tyfield Importers, Inc.*, 289 F.3d 589, 596 (9th Cir. 2002).

Consumers benefit from trademarks because, as noted above, they can trust that the goods or services sold under the mark will meet a certain level of quality. One way that the Act extends the benefits of trademarks and protects incentives to develop them is by allowing trademark owners to license the use of their marks to distributors, franchisees, and other parties. Such licensing allows information about source and quality to be efficiently conveyed to

consumers through the mark without the licensor having to risk losing title to its mark. Indeed, trademarks would be of much less value to society if only vertically integrated firms using their own trademarks could safely take advantage of trademark law's protections. *See TMT N. Am., Inc. v. Magic Touch GmbH*, 124 F.3d 876, 882 (7th Cir. 1997) (citing 2 J. Thomas McCarthy, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 18:63 (4th ed.1997)).

The Act reflects a decision by Congress to afford trademark owners the right to license marks in exchange for their statutory obligation to retain quality control over the mark's use, for the purpose of ensuring the protection of the public.[4] If the trademark owner fails to fulfill its affirmative duty to police the mark as used by its licensee, it may lose some or all of its rights in the mark. *See Barcamerica Int'l*, 289 F.3d at 596 ("[W]here the licensor fails to exercise adequate quality control over the licensee, 'a court may find that the trademark owner has abandoned the trademark, in which case the owner would be estopped from

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[4] Prior to the Act, it was not clear that trademark owners could license their rights to third parties without risk of loss by abandonment. *See* 3 J. Thomas McCarthy, TRADEMARKS AND UNFAIR COMPETITION, § 18:39 (5th ed. 2017) (under early theories of trademark protection, "trademark licensing was viewed as impossible, since licensing meant that the mark was being used by persons not associated" with the source).

asserting rights to the trademark.'" (quoting *Moore Bus. Forms, Inc. v. Ryu*, 960 F.2d 486, 489 (5th Cir. 1992))). This statutory obligation of a trademark owner to exercise quality control is distinct from any contractual rights—whether of the licensor or the licensee—that arise under a license agreement. *See In re SIMA Int'l, Inc.*, No. 17-21761 (JJT), 2018 WL 2293705, at *7 n.24 (Bankr. D. Conn. May 17, 2018) (rejecting the First Circuit's analysis in *Tempnology* and explaining that "the legal rigors of trademark policing, not contractual obligations imposed upon the licensor to monitor its trademarks[,] are the source of the debtor's burdens").

Given the importance of the licensor maintaining quality control, trademark license agreements customarily specify the minimum level of quality that the licensee must meet in its manufacture, distribution and sale of the goods or services at issue. *See* Raymond T. Nimmer & Jeff C. Dodd, Viewing licenses through different prisms - The Trademark license example, MODERN LICENSING LAW § 1:20 (2018–2019 ed.) (because the failure to retain such control can result in the unenforceability of the mark, "trademark licenses typically contain quality control provisions"). Quality control provisions impose obligations on the licensee in favor of the licensor. The licensee has the obligation to comply with those requirements; the licensor has the right to ensure that the licensee does so. If the licensee fails to meet its quality obligations, that can

result in use of the trademark defrauding the public, which is why the licensor then has the right to enforce the quality requirements including, if permitted by the agreement, either terminating the licensee's right to use the mark or seeking specific performance to require the licensee to meet the specified quality levels. *See Zino Davidoff SA v. CVS Corp.*, 571 F.3d 238, 246 (2d Cir. 2009) ("The mark holder is entitled to protection against acts that subvert its ability to protect the reputation of its marks by exercising quality controls.").

B. The Significance of Trademark Licenses to the U.S. Economy.

This Court has repeatedly recognized the significance of trademarks and trademark licenses to the United States economy. *See, e.g., Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183 (2010) (addressing antitrust issues concerning trademark licensing by the National Football League); *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281 (1988) (addressing validity of Customs Service regulation concerning importation of foreign-made goods where United States trademark owner authorized use of the mark); *U.S. v. Sealy, Inc.*, 388 U.S. 350 (1967) (addressing antitrust issues concerning trademark licensing for mattresses). Given that recognition, this case has particular importance because the Court can establish a sound rule that both confirms the stability of the trademark regime in the context

of a bankruptcy and harmonizes trademark interests with the goals of the Bankruptcy Code.

Trademark licenses are implicated in a variety of litigation contexts that illustrate the myriad ways in which trademarks are critical to both licensors and licensees. To cite just a few examples, both recent and historic:

- *Me Renee LLC v. Elite World, S.A.*, 674 F. App'x 620 (9th Cir. 2016) (company in the business of licensing trademarks for use in high-fashion modeling granted to licensee right to act as a "Master Licensee" of the trademarks for the purpose of sublicensing to third parties the right to create, open and operate fashion academies);

- *State of Idaho Potato Comm'n v. G & T Terminal Packaging, Inc.*, 425 F.3d 708 (9th Cir. 2005) (statutorily created agency of the State of Idaho formed for the purpose of promoting Idaho potatoes licensed several certification marks for Idaho potatoes including "Idaho" and "Grown in Idaho" to potato growers and distributors);

- *Pannell Kerr Forster Int'l Ass'n v. Quek*, 5 F. App'x 574 (9th Cir. 2001) (accounting firm licensed trademarks to consulting

groups related to accounting firm's name and style); and

- *Huber Baking Co. v. Stroehmann Bros. Co.*, 252 F.2d 945 (2d Cir. 1958) (non-profit cooperative organized under New York law to help promote business of baker-members located throughout the United States licensed, as part of a cohesive branding and quality control program, a tradename and associated mark to manufacturer-members of the cooperative).

Further examples are legion.[5] Trademark licenses undoubtedly are omnipresent; the rights they convey

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[5] *See, e.g.*, *Visual Dynamics, LLC v. Chaos Software Ltd.*, 309 F. Supp. 3d 609 (W.D. Ark. 2018) (owner of mark for software products gave software reseller license to use mark in marketing and advertising materials for sale of owner's products on reseller's website); *Kroma Makeup EU, LLC v. Boldface Licensing + Branding, Inc.*, 264 F. Supp. 3d 1294, 1297 (M.D. Fla. 2017) (addressing two different licensing agreements, one of which was an agreement permitting the licensee to create and market cosmetics endorsed by the Kardashians under one mark ("Khroma"), and the other of which was a licensing agreement permitting the use of a different—but similar—mark for the purpose of advertising, sale, and promotion of Kroma makeup products); *UHS of Del., Inc. v. United Health Servs., Inc.*, 227 F. Supp. 3d 381 (M.D. Pa. 2016) (healthcare management company licensed to affiliate and subsidiary facilities trademarks for use in connection with hospital services and hospital management services); *Hard Rock Cafe Int'l, (USA), Inc. v. Hard Rock Hotel Holdings, LLC*, 808 F. Supp. 2d 552 (S.D.N.Y. 2011) (addressing an exclusive license "to use and exploit the Hard Rock Hotel and Hard Rock

to licensees are of enormous economic significance; and substantial investments are made in reliance on these rights.

In 2014, trademarks accounted for $6.1 trillion in value added to the U.S. gross domestic product. Economics and Statistics Administration & United States Patent and Trademark Office, INTELLECTUAL PROPERTY AND THE U.S. ECONOMY: 2016 UPDATE 22 (2016). In the United States alone, trademark licensors generated $7.3 billion in royalty revenue from the licensing of goods and services in 2014. Licensing Industry Merchandisers' Association,

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Casino trademarks in areas west of the Mississippi River, solely in connection with development, operation, ownership, management, operation of and promotion of Hard Rock Hotel/Casinos and Hard Rock Casinos"); *Trace Minerals Research, L.C. v. Mineral Res. Int'l, Inc.*, 505 F. Supp. 2d 1233 (D. Utah 2007) (marketing arm of companies granted a license to manufacturing arm to use trademarks as part of a supply agreement); *McGraw-Hill Cos., Inc. v. Vanguard Index Tr.*, 139 F. Supp. 2d 544 (S.D.N.Y.), *aff'd sub nom. McGraw Hill Cos., Inc. v. Vanguard Index Tr.*, 27 F. App'x 23 (2d Cir. 2001) (licensing the rights to use the data that comprised the Standard & Poor's index and to use the Standard & Poor's trademarks to financial services companies, analysts and investors); *Superior Bedding Co. v. Serta Assocs., Inc.*, 353 F. Supp. 1143 (N.D. Ill. 1972) (addressing a license that granted independent bedding manufacturers the exclusive right to manufacture and sell Serta patented, trademarked and trade-named products in prescribed territories); *Helpful Hound, L.L.C. v. New Orleans Bldg. Corp.*, No. CV 18-3500, 2018 WL 3743817 (E.D. La. Aug. 7, 2018) (city and building corporation licensed the name of a food hall and market to the lessee renting the space).

LIMA GLOBAL LICENSING INDUSTRY SURVEY 2015 REPORT 15 (2015). This translates into an estimated $133.3 billion in retail sales of licensed goods and services. *Id.* at 14.

Licensing provides a significant stream of revenue for trademark licensors, and extensive commercial opportunities. *See* Irene Calboli, *The Sunset of "Quality Control" in Modern Trademark Licensing*, 57 AM. U. L. REV. 341, 343 (2007). Licenses are granted in myriad circumstances, from the sale of a business (where the purchase price includes an up-front payment for the license) to distribution and manufacturing arrangements (where the licensed mark is central to the success of the licensees' business). By, for example, allowing trademark licensors to outsource the manufacturing or distribution of a product to specialized licensees who can do so more cheaply or effectively, licensors can distribute workloads efficiently and enjoy the benefits of economies of scale. *See* David J. Franklyn, *The Apparent Manufacturer Doctrine, Trademark Licensors and the Third Restatement of Torts*, 49 CASE W. RES. L. REV. 671, 681 (1999). Licenses also enable licensors to increase brand recognition and to reach new markets.

Just as trademarks are the most widely used form of registered intellectual property (*see* p. 5 *supra*), trademark licenses play an important role in bankruptcies where intellectual property is included

in the assets of the debtor. "[S]ince 1988, out of 1100 bankruptcy filings concerning intellectual property, over 600 involve trademarks." Kayvan Ghaffari, *The End to an Era of Neglect: The Need for Effective Protection of Trademark Licenses*, 87 S. CAL. L. REV. 1053, 1054 (2014).

II. The *Sunbeam* Rule Best Promotes the Strength and Stability of the Trademark System.

This Court should reverse the First Circuit's decision and adopt the *Sunbeam* rule, which treats a licensor's rejection of a trademark license agreement as a breach but not a termination. Adoption of this uniform, nationwide rule would promote the overall health of the trademark system and is fully consistent with the Bankruptcy Code.

A. The *Sunbeam* Rule Furthers the Interests of Trademark Licensors, Licensees, and Consumers.

The market for trademark licenses will function best under the *Sunbeam* rule. By contrast, the *Tempnology/Lubrizol* approach would mean that neither a trademark owner nor its licensee—at the time that they are negotiating a trademark license—could be certain whether the licensed rights would survive the licensor's possible future bankruptcy.

This uncertainty is to the detriment of licensors, licensees, and consumers. That would be even more

true of an approach that would allow bankruptcy judges to decide, on a case-by-case basis, which rule to apply; that would create additional uncertainty as to the effect of a possible rejection of a trademark license in a future bankruptcy. Any uncertainty diminishes the economic incentives for the parties to license and use trademarks, and considerably increases the financial risks to both parties. *See* Peter S. Menell, *Bankruptcy Treatment of Intellectual Property Assets: An Economic Analysis*, 22 BERKELEY TECH. L.J. 733, 769 (2007) (explaining that the "particularly harsh results" of license rejection make it less likely a party invests in trademarks, and the inability to contract around that risk further erodes these incentives). If the parties' incentives to enter into stable trademark licensing arrangements are to be strengthened, it is crucial to preserve for the licensee "[t]he essential element in any trademark license is the continuing obligation of the licensor to permit the licensee's use of the trademark in connection with the sale of the licensee's goods." David M. Jenkins, *Licenses, Trademarks, and Bankruptcy, Oh My: Trademark Licensing and the Perils of Licensor Bankruptcy*, 25 J. MARSHALL L. REV. 143, 156-57 (1991) (hereinafter "Jenkins").

In negotiating trademark license agreements, licensors have a strong interest in obtaining maximum value for their licensed assets. The *Tempnology/Lubrizol* approach undercuts the

licensor's ability to do so. A potential licensee will pay less to a licensor for rights that carry the risk of impairment in the event of a licensor's bankruptcy. In assessing the potential rights that the *Tempnology/Lubrizol* rule confers on a licensor that might become bankrupt, a rational licensee will insist on paying a discounted price for a trademark license, knowing it will be at the mercy of the licensor as to whether it can continue to use the mark if the licensor files for or is put into bankruptcy. *See* Nicholas W. Quesenberry, *Risky Business: How the Economic Impact of the Risk of Debtor Default Mandates Application of the Presumptive-Contract Interest Rate in the Case of a Cramdown Plan against a Secured Creditor with a Lien on Personal Property in Chapter 13*, 22 J. BANKR. L. & PRAC. 2 Art. 5. (2013) ("It is manifest that any disinterested buyer [i.e., the licensee] would be willing to pay less for a riskier, less stable income stream [i.e., from its rights to exploit the rights it has licensed] and more for a more stable and reliable one.").

In *Tempnology*, rather than considering the parties' respective incentives at the time of licensing or their existing rights under the trademark license agreement, the First Circuit apparently was more concerned with the price a purchaser would pay for the debtor's trademarks if the licensee were permitted to continue to use the licensed marks post-rejection. *See Tempnology*, 879 F.3d at 403. The First

Circuit's approach improperly prioritized the resale value of the trademark over the rights of the current licensee, without recognizing the amount that it had paid up front or in royalties to utilize the license.

Licensees, too, are harmed under the *Tempnology/Lubrizol* rule. Loss of a trademark license can severely injure or even destroy a business, with the licensee itself possibly forced into bankruptcy if denied use of the mark. *See* Jenkins, 25 J. MARSHALL L. REV. at 175 (when a licensor rejects a trademark license, "[a] trademark licensee risks the total abrogation of its right to use a trademark, a valuable property right . . . [and] licensees must continue to bear the economic burden of trademark owners' mismanagement and thus needlessly risk the loss of their investments"). Accordingly, a licensee whose license is subject to termination in bankruptcy will be less willing to invest capital in the sort of resources—personnel, machinery or other production capacity, advertising and promotion—that would enable it to maximize sales and fully profit from its license. In turn, if it does not maximize its sales of products and services bearing the licensed trademark, that will reduce royalties to the trademark licensor, thus rendering the licensing transaction less economically beneficial for both parties. Stated differently, a debtor itself is harmed by the *Tempnology/Lubrizol* rule because its pre-rejection revenue stream under the licensing

agreement would be less than what it would otherwise receive from the licensee.

To avoid the potential application of the *Lubrizol* rule in any particular case, INTA's members, whether acting as licensors or licensees, have had to negotiate provisions that attempt to minimize the bankruptcy risks. Parties may ultimately agree that the licensor must establish a bankruptcy-remote vehicle, perhaps offshore, to hold and license the trademarks. The hope is that the "remote" licensor can try to avoid being swept into a bankruptcy of the operating company, so that the license agreement will then not be subject to rejection. Alternatively, the licensee might negotiate stringent financial covenants that the licensor must meet in order to have some advanced warning of potential financial distress of the licensor, with a potential assignment of the trademark from the licensor to the licensee if the covenants are not met. These negotiations can add to the expense and time of negotiating the trademark license, draining resources from more productive activity and, potentially, resulting in lower prices to be paid to the licensor.

The licensee of trademark rights should not be forced to live in fear that the licensor, having licensed these rights for consideration, may be entitled, years later, to claw them back in a bankruptcy. The grant of a license conveys to the licensee certain rights in the trademark (as distinct

from title in the trademark). *See, e.g.*, 3 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 18:40 (5th ed.) ("Every license carries with it a waiver of the right of the trademark owner to sue for infringement arising out of acts that fall within the scope of the license."). The First Circuit disregarded the licensee's property interest when it inappropriately advanced its own "equities analysis that weighs reorganization objectives more heavily in the balance than protections for commerce in intellectual property." *In re SIMA*, 2018 WL 2293705, at *7 n.25. As with other rejected executory agreements, while the debtor-licensor is able to avoid its contractual obligations, it should not be entitled to terminate the rejected agreements in order to avoid its statutory obligations and the licensee's state law rights.

In sum, *Sunbeam*'s approach is more equitable because it takes into account the interests of both parties to a trademark license and, through them, the consumers that both parties serve.

B. The *Sunbeam* Rule is Consistent with the Lanham Act's Quality Control Obligations.

If the debtor-licensor rejects a trademark license agreement under the *Sunbeam* rule, it is relieved of any contractual obligations (other than the grant of the license) it might have under that agreement. The licensee's right to continue to use the licensed mark

would remain intact, as would its own contractual obligation to continue to comply with the license, including any provisions requiring it to maintain quality control over the licensed product. The licensor may continue to enforce quality control in accordance with its statutory obligations and its own self-interest, if it so chooses, inasmuch as failure to enforce quality control could result in invalidation of the trademark itself, thereby potentially impoverishing the estate.

Concerns that the *Sunbeam* rule is inconsistent with the debtor-licensor's obligations to maintain quality control are unfounded. Those obligations are statutory, deriving entirely from the Act. *See* 15 U.S.C. § 1055. They serve a public purpose that Congress itself recognized at the time of its enactment. *See Gorenstein Enters., Inc. v. Quality Care-USA, Inc.*, 874 F.2d 431, 435 (7th Cir. 1989) ("The purpose of a trademark, after all, is to identify a good or service to the consumer, and identity implies consistency and a correlative duty to make sure that the good or service really is of consistent quality."); *Star-Kist Foods, Inc. v. P.J. Rhodes & Co.*, 769 F.2d 1393, 1396 (9th Cir. 1985) ("The purpose of the rule is to protect the public from deception." (citation omitted)); *Dawn Donut Co. v. Hart's Food Stores, Inc.*, 267 F.2d 358, 367 (2d Cir. 1959) ("Without the requirement of control, the right of a trademark owner to license his mark separately from the business in connection with which it has

been used would create the danger that products bearing the same trademark might be of diverse qualities.").

The trademark owner's statutory obligations are wholly independent of any contractual undertakings by a licensor or licensee, whether in a rejected agreement or otherwise. That the licensor is in bankruptcy, or that quality control obligations may be set out in a trademark license agreement, is beside the point. The licensor's failure to maintain quality control will result in the loss of trademark rights under any circumstance, whether or not a licensor is a debtor and without regard to whether it decides to reject the trademark license agreement. *See, e.g., Ritchie v. Williams*, 395 F.3d 283, 290 (6th Cir. 2005) (noting a trademark licensor's duty under § 1055 to control the quality of both its license and licensee in finding that the licensor abandoned its mark (citation omitted)). A debtor-licensor cannot reject a statutory requirement; it may only reject its contractual obligations.

In other words, the obligations that the Act imposes on a trademark owner-licensor are not overridden by the debtor-licensor's rights under the Bankruptcy Code. That principle is entirely consistent with the rule that "[p]roperty interests are created and defined by [applicable non-bankruptcy] law [u]nless some federal interest requires a different result." *Butner v. U.S.*, 440 US

48, 55 (1979). In other words, a trademark licensee's rights should be the same whether the licensor breaches the license agreement outside of bankruptcy or breaches (by means of a rejection) the agreement in the course of a bankruptcy. *See Sunbeam*, 686 F.3d at 377 ("What § 365(g) does by classifying rejection as breach is establish that in bankruptcy, as outside of it, the other party's rights remain in place."); *In re Columbia Gas Sys. Inc.*, 50 F.3d 233, 239 n.8 (3d Cir. 1995) ("Rejection ... is equivalent to a nonbankruptcy breach."); *In re Ortiz*, 400 B.R. 755, 769 (C.D. Cal. 2009) ("Section 365 simply does not speak to which obligations may and may not be enforced post-bankruptcy against the debtor"; rather, state law would determine whether any provisions of a contract remained enforceable against the debtor post-rejection).[6] A licensor's breach outside of bankruptcy would not automatically result in termination of the license agreement; termination should not, therefore, be the inevitable consequence of breach (in the form of a rejection of the contract) in the bankruptcy context.

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[6] *See also Thompkins v. Lil' Joe Records, Inc.*, 476 F.3d 1294, 1306 (11th Cir. 2007) ("[r]ejection has absolutely no effect upon the contract's continued existence; the contract is not cancelled, repudiated, rescinded, or in any other fashion terminated") (quoting *Cohen v. Drexel Burnham Lambert Grp. (In re Drexel Burnham Lambert Grp., Inc.)*, 138 B.R. 687, 703 (Bankr. S.D.N.Y. 1992)); *infra* at p. 34.

Affirming the First Circuit's decision would "make[] bankruptcy more a sword than a shield, putting debtor-licensors in a catbird seat they often do not deserve." *In re Exide*, 607 F.3d 957, 967-68 (3d Cir. 2010) (Ambro, J., concurring); *see also In re Crumbs Bake Shop, Inc.*, 522 B.R. 766, 772 (Bankr. D.N.J. 2014) (noting the inequity in stripping a licensee of rights the debtor had already bargained away).

The ability of the parties to a trademark license agreement to allocate quality control obligations between themselves means that the *Sunbeam* rule will not lead to an unduly harsh result for the debtor-licensor. Similarly, any concerns that the *Sunbeam* rule would be inconsistent with the Bankruptcy Code's interests in relieving the debtor of burdens that would impair reorganization are unfounded.

First, the Act's statutory obligation that the licensor maintain the quality of its trademarks is substantially mitigated by the inherent legal presumption that any level of quality control will be sufficient. *See, e.g.*, *TMT N. Am.*, 124 F.3d at 885–86 (burden to establish lack of reasonable quality control is "heavy"; no loss of trademark rights absent evidence of "significant deviation" from licensor's quality standards). Notably, in this regard, "the standards for sufficient quality control have become more and more lenient in recent years." Laura

Jelinek, *Equity for Brand Equity: The Case for Protecting Trademark Licensees in Licensor Bankruptcies*, 40 AIPLA Q.J. 365, 389-90 (2012). Furthermore, deference to the parties' arrangement is strong. *See* RESTATEMENT (Third) of Unfair Competition § 33, comment c (Am. Law Inst. 1995) ("RESTATEMENT") ("[a]s a general matter, courts are reluctant to interfere with the marketing arrangements adopted by trademark owners, and minimal control over the quality of a licensee's goods or services is often sufficient"); *see also Amscan Inc. v. Shutter Shades, Inc.*, No. 13-cv-1112, 2015 U.S. Dist. LEXIS 180647, at *13 (S.D.N.Y. Apr. 30, 2015) (citing *Warner Bros., Inc. v. Gay Toys, Inc.*, 724 F.2d 327, 334 (2d Cir. 1983) ("Because an assertion of insufficient control can lead to a forfeiture of rights, the party arguing for it must meet a 'high burden of proof.'" (citation omitted))); *Monster, Inc. v. Dolby Labs. Licensing Corp.*, 920 F. Supp. 2d 1066, 1076 (N.D.Cal. 2013) (standard of proof required of the challenger to void the trademark on the basis of naked licensing is "stringent").

Second, any burden on the debtor-licensor to ensure that its licensee maintains quality—including post-rejection—is lessened by the licensee's contractual obligations to itself maintain quality. Those obligations would continue in the bankruptcy context. *See In re Crumbs*, 522 B.R. at 773. In many cases, quality control is delegated almost entirely to the licensee. As the Ninth Circuit observed in

Barcamerica Int'l, 289 F.3d at 596, "courts have upheld licensing agreements where the licensor is familiar with and relies upon the licensee's own efforts to control quality." (citations omitted). The Restatement similarly notes that "the trademark owner is justified in relying on the reputation and expertise of the licensee and not exercising a contractual right to control if there is an absence of evidence indicating deviations from the agreed standards of procedures." RESTATEMENT § 33.

Third, it is not inappropriate for the licensor to exercise its quality control obligations under the Act by relying on its licensee to maintain quality of its use of the mark in accordance with the trademark license agreement. Licensees will want to protect the mark in which they have made an investment. Absent their maintaining quality with respect to licensed marks, others could begin to use the mark or, in some cases, they could themselves be liable for trademark infringement or unfair competition. *See In re Crumbs*, 522 B.R. at 773 (citing Jenkins, 25 J. MARSHALL L. REV. at 162–64); *see also Warner-Lambert Co. v. Northside Dev. Corp.*, 86 F.3d 3, 6 (2d Cir. 1996) (wholesaler's distribution of nonconforming product constitutes trademark infringement under the Lanham Act if it tarnishes the trademark owner's image); *Joseph Bancroft & Sons Co. v. Shelley Knitting Mills, Inc.*, 212 F. Supp. 715 (E.D. Pa. 1962) (licensee's sale of goods at a quality standard below that of licensor constituted

unfair competition and trademark infringement). *Cf. Franchised Stores of N.Y., Inc. v. Winter*, 394 F.2d 664 (2d Cir. 1968) (sale of non-authorized goods by sublicensee held to be trademark infringement). Relying on the licensee to maintain quality is not a material burden on the licensor. That is because the licensee already has the contractual obligation to maintain quality, and any breach may give the licensor additional rights (including, depending on the terms of the agreement, the right to terminate the license on its own terms).

Further, general market forces and anti-fraud laws will keep the licensee fully accountable to the public with respect to the quality of the marks. *See In re Crumbs*, 522 B.R. at 773 (producing a good under a trademark is a warrant "to the public that its goods are of the same level of quality that the trademark signifies").

Accordingly, any concerns that the *Sunbeam* rule does not recognize the importance of quality control under the Act and would allow licensees to use trademarks without ensuring quality control are without foundation.

C. The *Sunbeam* Rule is Consistent with the Text and Purpose of the Bankruptcy Code.

The *Sunbeam* rule squares not just with trademark law and policy, but also with the

Bankruptcy Code. In 1987, Congress expressly abrogated *Lubrizol's* result with respect to licenses of "intellectual property," which it defined to include patents, copyrights, and trade secrets. *See* 11 U.S.C. § 365(n). At the time, it explicitly left open the question of the impact of rejection on trademark licenses. The legislative history of section 365(n) makes clear that Congress did so not to enable a debtor to use rejection to cancel a pre-bankruptcy grant of intellectual property license rights: "[Section] 365 was [n]ever intended to be a mechanism for stripping innocent licensee[s] of rights." S. Rep. No. 100-505, at 4 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 3200, 3203. "Congress never anticipated that . . . the licensee would lose not only any future affirmative performance required of the licensor under the license, but also any right of the licensee to continue to use the intellectual property as originally agreed in the license agreement." *Id.* at 3, *as reprinted in* 1988 U.S.C.C.A.N. 3200, 3201.

Although Congress did not include trademarks in section 365(n), that choice did not reflect any view that the *Lubrizol* rule was correct. Nor is there anything in the text of section 365(n) itself, or in the accompanying legislative history, that supports the argument that rejection of trademark license agreements should ever result in termination of the licensee's rights. Rather, Congress stated that its intent in omitting trademarks from section 365(n) was to have courts consider and "equitably"

determine the effect of the statutory rights of a debtor to reject a trademark license agreement that confers rights on a licensee:

> In particular, trademark, trade name and service mark licensing relationships depend to a large extent on control of the quality of the products or services sold by the licensee. Since these matters could not be addressed without more extensive study, it was determined to postpone congressional action in this area and to allow the development of ***equitable treatment of this situation by bankruptcy courts***.

S. Rep. No. 100-505, at 5 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 3200, 3204 (emphasis added).[7] Thirty years of license negotiation and litigation experience

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[7] Moreover, "an omission is just an omission," and the "limited definition [of 'intellectual property'] in §101(35A) means that §365(n) does not affect trademarks one way or the other." *Sunbeam*, 686 F.3d at 375. Congress noted that, although "such rejection [of trademark agreements] is of concern," section 365(n) does not "address or intend any inference to be drawn concerning the treatment of executory contracts which are unrelated to intellectual property [as defined in the statute]." S. Rep. No. 100-505, at 5 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 3200, 3204. Furthermore, because *Lubrizol* did not involve trademarks, Congress was not required to act promptly to confirm the impact of rejection on trademark license agreements and it was, therefore, able to defer to the bankruptcy courts.

has shown that the most equitable way to treat rejection of trademark license agreements in bankruptcy is uniform adoption of the *Sunbeam* rule, as it most fairly harmonizes the interests of trademark licensors and licensees.

Congress' reference to bankruptcy courts developing "equitable treatment" of the handling of pre-petition trademark license agreements granted by a debtor-licensor is entirely consistent with the basic equitable principles underpinning the Bankruptcy Code. *See Young v. U.S.*, 535 U.S. 43, 50 (2002) (bankruptcy courts "are courts of equity and 'appl[y] the principles and rules of equity jurisprudence'" (quoting *Pepper v. Litton*, 308 U.S. 295, 304 (1939))). These equitable principles have been cited by courts that have embraced the *Sunbeam* approach. *See, e.g., In re Exide*, 607 F.3d at 967 ("Rather than reasoning from negative inference to apply another Circuit's holding to this dispute, the Courts here should have used . . . their equitable powers to give [the debtor] a fresh start without stripping [the licensee] of its fairly procured trademark rights") (Ambro, J., concurring).

The *Sunbeam* rule also is consistent with the general principle of bankruptcy law that rejection of an executory contract does not terminate the contract, but, instead, is a breach by the debtor. The purpose of section 365 is not "to be the functional equivalent of a rescission, rendering void the

contract and requiring that the parties be put back in the positions they occupied before the contract was formed." *Thompkins*, 476 F.3d at 1306 ("[r]ejection has absolutely no effect upon the contract's continued existence; the contract is not cancelled, repudiated, rescinded, or in any other fashion terminated" (quoting *In re Drexel Burnham Lambert Grp., Inc.*, 138 B.R. at 703)); *Med. Malpractice Ins. Ass'n. v. Hirsch*, 114 F.3d 379, 386-87 (2d Cir. 1997) ("while rejection is treated as a breach, it does not completely terminate the contract"); *O'Neil v. Cont'l Airlines, Inc.*, 981 F.2d 1450, 1459 (5th Cir. 1993) ("[t]o assert that a contract effectively does not exist as of the date of rejection is inconsistent with deeming the same contract breached"); *Kopolow v. P.M. Holding Corp.*, 900 F.2d 1184, 1191 (8th Cir. 1990); *Leasing Serv. Corp. v. First Tenn. Bank Nat'l Ass'n*, 826 F.2d 434, 436–37 (6th Cir. 1987); *Eastover Bank for Sav. v. Sowashee Venture*, 19 F.3d 1077, 1082 (5th Cir. 1994). As noted by Judge Torruella in the decision below, the appropriate focus should be to view the impact of rejection of trademark license agreements in the context of section 365 in general, which is a breach, but not termination, of the agreement. *See Tempnology*, 879 F.3d at 406 (concurring in part, dissenting in part).

Significantly, Congress specifically placed a debtor's ability to reject an executory contract in chapter 3 of the Bankruptcy Code, which governs

administrative powers—i.e., the trustee's power to breach or perform a contract—and not in chapter 5, which governs a debtor's ability to avoid or recover certain assets. *See also Sunbeam*, 686 F.3d at 377 (noting the distinction between a debtor who seeks to reject a license agreement under section 365 and a debtor who seeks to avoid a pre-petition transaction under chapter 5 of the Bankruptcy Code); 2 Norton Bankruptcy Law and Practice § 46:57 (3d ed. 2008) ("The Bankruptcy Code instructs us that rejection is a breach of the executory contract. It is not avoidance, rescission, or termination."). Congress' placement of the rejection power in chapter 3 is presumed to be intentional, and signals its intent that rejection is not intended to avoid or rescind a pre-petition transfer of trademark rights, which would allow the debtor to recover the trademark. *See Russello v. U.S.*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (quoting *U.S. v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972))).[8]

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[8] Unlike preferential or fraudulent transfers under chapter 5, which a debtor could avoid and recover in furtherance of certain bankruptcy policies, there is no policy argument in favor of allowing a debtor in chapter 7 or chapter 11 to reject a contract and rescind rights that were validly transferred away to a good faith licensee.

Section 365 also expressly states that the debtor is able to free itself from burdensome contractual obligations that would impede its ability to obtain a fresh start by treating such rejection as a pre-petition "breach." 11 U.S.C. § 365(g) (providing that "rejection ... constitutes a breach of such contract ... immediately before the date of the filing of the petition"). For example, a debtor-lessee can reject a non-residential property lease that requires it to pay above-market rents or a lease for equipment. In both cases the creditor-lessor would lose the benefit of the payment stream (and would become a creditor with a claim for damages against the debtor), but would retain ownership of its property. *See generally NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1984) ("authority to reject an executory contract is vital to the basic purpose of a Chapter 11 reorganization, because rejection can release the debtor's estate from burdensome obligations that can impede a successful reorganization"); *Orion Pictures Corp. v. Showtime Networks, Inc.*, 4 F.3d 1095, 1098 (2d Cir. 1993) ("§ 365 permits the trustee or debtor-in-possession, subject to the approval of the bankruptcy court, to go through the inventory of executory contracts of the debtor and decide which ones it would be beneficial to adhere to and which ones it would be beneficial to reject"). The rejection rule adopted by the First Circuit would have a very different result; it would allow the debtor to claw back property rights that it had already contracted away.

Properly applied, Section 365 permits a debtor-licensor to reject a trademark license agreement to allow it to avoid some of the agreement's burdensome contractual obligations. These might include, for example, the pursuit or maintenance of trademark registrations in multiple jurisdictions or undertaking or funding enforcement actions against third parties who are infringing the licensed mark. The other primary objective of enabling the rejection of executory contracts is that any claims of the licensee for damages resulting from breach-by-rejection would constitute unsecured pre-petition claims. 11 U.S.C. § 365(g). This is a timing issue for the breach, but it has no impact on the existence of the contract or the counterparty's rights post-rejection under applicable non-bankruptcy law, such as the law of contracts or trademark law, as set out in the Act. If, therefore, the licensor post-rejection breaches its obligations under the trademark license agreement, the licensee might be compelled to expend its own funds on maintenance or enforcement because it can not compel the licensor to comply with the agreement; in such case, the licensee would only have a pre-petition claim for damages. The Bankruptcy Code does not, however, support the view that rejection and breach of an executory contract, including a trademark license agreement, should permit a debtor to revoke and reclaim rights that it had previously granted to third parties. *See* S. Rep. No. 100-505, at 4 (1988), *as*

reprinted in 1988 U.S.C.C.A.N. 3200, 3203 ("[section] 365 was [n]ever intended to be a mechanism for stripping innocent licensee[s] of rights").

D. The Force of the *Sunbeam* Rule is Shown by the Other Courts That Have Followed It.

Numerous lower courts have recognized that the *Sunbeam* rule is correct because it equitably balances the interests of trademark licensors and licensees in bankruptcy. In *In re Exide Tech.*, 607 F.3d 957, Judge Ambro's concurring opinion advocated the *Sunbeam* approach. There, the licensee, whose trademark license had been terminated by the debtor-licensor, had argued (1) that the license was not executory, and (2) that the court below had erred in determining that the rejection terminated the licensee's rights. The majority in *Exide* did not reach the second issue because it concluded that that license was not executory. *Id.* at 964. In his concurrence, Judge Ambro did address that issue, stating that "a trademark licensor's rejection of a trademark agreement under 11 U.S.C. § 365 does not necessarily deprive the trademark licensee of its rights in the licensed mark." *Id.* at 965 (Ambro, J., concurring). He emphasized that the bankruptcy laws should not allow a licensor to take back rights that it had bargained away. *Id.* at 967.

Bankruptcy courts also have followed the approach in *Sunbeam*. *See, e.g.*, *In re SIMA*, 2018 WL 2293705, at *8 (criticizing the *Tempnology* majority: it "strains to resurrect *Lubrizol*, [and] is plainly contrary to Congress' explicit efforts to rebalance affected rights on intellectual property and leave Section 365(g) to answer otherwise unresolved trademark issues"); *Banning Lewis Ranch Co. v. City of Colo. Springs*, 532 B.R. 335, 345 (Bankr. D. Co. 2015) ("rejection of a contract does not work a rescission of the contract and is not, itself, an avoiding power"; holding that licensees under rejected contract could continue to use trademark rights granted under licenses (citing *Sunbeam*, 686 F.3d at 377)); *In re Crumbs*, 522 B.R. at 770 ("This Court is not persuaded by the decision in *Lubrizol* and is not alone in finding that its reasoning has been discredited."). In fact, despite the split in the courts, the recent trend has been to follow *Sunbeam* and not *Lubrizol*. *See* Order at 8, *Aerogroup Int'l, LLC v. Wiesner Prods., Inc.*, No. 17-51889 (KJC) (Bankr. D. Del. Jan. 2, 2018), ECF No. 25 ("Few courts, including me, followed *Lubrizol*, cutting off licensing rights, but the current legal landscape has changed and it points in the favor of continuing the licensee's rights, post-rejection...").

In adopting section 365(n), Congress made clear that it intended to "allow the development of equitable treatment of this situation [involving the treatment of trademark licenses in bankruptcy] [to

the] courts." S. Rep. No. 100-505, at 5 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 3200, 3204. Courts have adhered to that command, and have not interpreted Congress' decision to omit trademarks from the protections of that section as an endorsement of the *Lubrizol* rule. Rather, in weighing the equitable considerations set out above, they have wisely adopted the *Sunbeam* rule.

CONCLUSION

The Court should reverse the decision below and adopt the rule articulated by the Seventh Circuit in *Sunbeam* with respect to the effect of a debtor-licensor's rejection of a trademark license agreement in bankruptcy.

December 17, 2018

Respectfully submitted,

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No. 17-1657

IN THE

Supreme Court of the United States

MISSION PRODUCT HOLDINGS, INC.,

Petitioner,

v.

TEMPNOLOGY, LLC, N/K/A OLD COLD LLC,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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INTEREST OF *AMICI CURIAE*[1]

Amici, whose names and affiliations are set forth in alphabetical order in the attached Appendix, are law professors who study the United States bankruptcy system. They write solely to share their disinterested views regarding the important question of federal bankruptcy law presented in this case. To the best of their knowledge, no amicus has any financial interest in the outcome of this case.

SUMMARY OF ARGUMENT

The First Circuit's decision below inexplicably resuscitates a long-rejected decision—*Lubrizol Enters., Inc. v. Richmond Metal Finishers, Inc.*, 756 F.2d 1043 (4th Cir. 1985)—that allowed intellectual property licensors to exploit a bankruptcy filing to unilaterally revoke the rights of their licensees. *Lubrizol* was wrong when the Fourth Circuit decided it: The decision relied on a misreading of the statute; it has been overruled on its facts by Congress; and it has been consistently rejected by both bankruptcy scholars and, until the decision below, the one other court of appeals to address the issue. *See Sunbeam Prods., Inc. v. Chi. Am. Mfg., LLC*, 686 F.3d 372, 377 (7th Cir. 2012) (Easterbrook, J.).

We write to call the court's attention to the existence of a remarkable consensus among legal scholars, documented below, that rejection of a contract under

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[1] Pursuant to Supreme Court Rule 37, counsel of record for petitioner and respondent have consented in writing to the filing of this brief. No counsel for a party authored this brief in whole or in part. No person other than amici and their counsel, and no party or counsel for a party, made a monetary contribution intended to fund the preparation or submission of this brief.

Section 365(a) of the Bankruptcy Code constitutes a breach of the relevant license agreement and not a rescission. *See infra* pp. 10-15 & n.8. Section 365(g) says exactly that. The consequences of this breach are determined by applicable non-bankruptcy law, and not a bankruptcy-specific rule. This *amicus* brief urges this Court to recognize this scholarly consensus and resolve the circuit split, created by the decision below, in favor of the Seventh Circuit's decision in *Sunbeam*.

The First Circuit's decision incorrectly allows a debtor/licensor to unilaterally rescind a trademark license by "rejecting" the agreement under Section 365(a) of the Bankruptcy Code. *See* 11 U.S.C. §365. This holding fundamentally misunderstands the effect of "rejection" and would allow debtor/licensors to unwind a variety of settled transfers of property rights. Under the First Circuit's rule, a debtor/licensor could use the power to reject to destroy a licensee's business or hold the licensee hostage, forcing it to pay twice for a license it has already purchased. This unjust result would be the unfortunate and natural consequence of treating the power to "reject" a contract as the power to "avoid" or claw back a transfer of property.

To the contrary, the power to "reject" a contract under Section 365 serves a crucial but more modest purpose: It allows the trustee to decline to perform a contract, where to do so would be burdensome on the estate and harmful to other creditors. Insolvent debtors in bankruptcy are, by definition, unable to satisfy all of their contractual obligations. Where the debtor is a party to a contract under which the debtor's unperformed contractual obligations are intertwined with conditional obligations of the non-debtor, the allocation of those rights and obligations is handled by

Section 365. Section 365(a) gives the debtor the choice to breach ("reject") or perform ("assume"). If the debtor elects to reject then, under Section 365(g), "the rejection of an executory contract ... of the debtor constitutes a breach of such contract." That formal act of breach allows the non-debtor to make a pre-petition claim for damages that can receive a distribution through the ordinary claims allowance process and is then discharged. Section 365 does nothing more than that. The power to reject is, simply, the power to breach and convert the counterparty's contractual claim for expectation damages into a prepetition claim in bankruptcy.

It has long been recognized that the trustee's power to reject is simply a power to breach, not a power to avoid settled property rights. *See, e.g.*, Jay Lawrence Westbrook, *A Functional Analysis of Executory Contracts*, 74 Minn. L. Rev. 227, 247-55 (1989) (Westbrook); Michael T. Andrew, *Executory Contracts in Bankruptcy: Understanding "Rejection,"* 59 U. Colo. L. Rev. 845, 855 (1988) (Andrew).[2] This is the view adopted, correctly, by the Seventh Circuit in *Sunbeam*. The precise consequences of the pre-petition "breach" are not determined by bankruptcy law. They are

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[2] These articles are over twenty years old, but their influence has persisted, and their underlying insights about the meaning of 11 U.S.C. §365 remain valid. *See* note 8 *infra*. Of course, there are debates about Section 365 that continue to this day. *See* John A.E. Pottow, *A New Approach to Executory Contracts*, 96 Tex. L. Rev. 1437 (2018); Jay Lawrence Westbrook & Kelsi Stayart White, *The Demystification of Contracts in Bankruptcy*, 91 Am. Bankr. L.J. 481, 532-33 (2017) (Westbrook & White). But the question of whether Section 365(g) means what it says is not one of them.

based, instead, on the parties' applicable non-bankruptcy rights under their agreement and principles of contract and intellectual property law. As *Sunbeam* noted, however, *see* 636 F.3d at 376, outside bankruptcy there is no readily apparent legal principle under which a *licensor's* breach of contract would limit a *licensee's* ability to exercise rights already granted to it under that contract.

The point is intuitive. If a seller of goods delivers goods pursuant to contract, but breaches an ongoing service obligation contained in the contract of sale, the failure to perform would not "unsell" the goods, or give rise to a right to take them back. Section 365(g) specifies that, because rejection is merely a breach, bankruptcy does not change this result. The same principle applies to trademark licenses. A trademark license grants the licensee the right to use the trademark under certain conditions, and a defense against an infringement lawsuit brought by anyone (including nonparties) for any covered use. A debtor/licensor may have other ongoing obligations (akin to the ongoing service contract above), but if the licensor fails to perform its obligations under the license ("breaches") or rejects the license in bankruptcy, the license will nonetheless continue to operate as a defense for the nonbreaching licensee against any claim of infringement.

The Seventh Circuit's decision in *Sunbeam* adheres to this principle, while the First Circuit's decision below effectively creates (or recreates) a novel, bankruptcy-specific form of "statutory breach" that terminates the trademark license—immediately transforming an innocent licensee into an infringer. *See* Pet. App. 10a. Nothing in contract or trademark law gives a special right to the grantor of a license to

"vaporize" that license in bankruptcy. *See Sunbeam*, 686 F.3d at 377. In fact, that would create an extremely harsh result: A franchisee that relies on its trademark license to do business might be forced to stop doing business immediately, subject to a reorganizing debtor's extortionate demand for a fresh payment for a right previously conveyed.

Such a result is not only inconsistent with the plain text of Section 365(g), but it also violates the cardinal principle, stated in *Butner v. United States*, 440 U.S. 48, 55 (1979), that "[p]roperty interests are created and defined by [applicable non-bankruptcy law] unless some federal interest requires a different result." In this case, not only is this bankruptcy-specific rule harsh, it defeats the settled commercial expectations of the licensee, and there is no discernible bankruptcy-policy reason for it. The First Circuit's bankruptcy-specific rule should thus be rejected, and the decision below reversed.

ARGUMENT

The Decision Below Fundamentally Misunderstands The Role Of Rejection Under Section 365 In The Bankruptcy System.

Section 365 operates within, and furthers, an architectural principle of the Bankruptcy Code: Bankruptcy discharges unsecured debt claims, but respects pre-bankruptcy property rights. Upon discharge in bankruptcy, enforcement of most pre-petition personal

obligations of the debtor for rights of payment is enjoined. *See* 11 U.S.C. §524.[3] As a general matter, however, this leaves non-debtor interests in property undisturbed. For instance, a creditor's security interest in the debtor's property is respected through the priority of secured claims and the right to adequate protection. 11 U.S.C. §§361, 362(d), 506, 507(b).

The Bankruptcy Code does contain a number of specific "avoidance" powers that allow the trustee to recapture property transferred by the debtor pre-petition. These powers include the power to avoid unperfected transfers, 11 U.S.C. §544(a), the power to avoid preferences, 11 U.S.C. §547, and the power to avoid fraudulent conveyances, 11 U.S.C. §544(b) and §548. Note that these powers are all located in Subchapter III of Chapter 5 of the Code, the subchapter that defines the estate. By contrast, the power to "assume or reject" under Section 365 is in Subchapter IV of Chapter 3 of the Bankruptcy Code, which deals with the administrative powers of the trustee—here the power to breach or perform a contract. When Congress meant to create a "clawback" power, it knew how to label it, and where to put it.

Section 365 is not one of those powers. It grants the debtor the power to decide whether to perform or breach a prepetition contract and determines how the resulting claim will be handled in the bankruptcy. The other consequences of breach are determined by applicable non-bankruptcy law. Far from imposing a bankruptcy-specific rule about the effects of "rejection," all

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[3] As will be discussed later, by contrast, the obligations of third parties owed to the debtor are assets that become property of the estate. 11 U.S.C. §541.

Section 365 does is label a rejection a breach. Treating the claim for expectation damages as a prepetition claim in bankruptcy ensures that the contractual counterparty is treated in bankruptcy just like any other creditor to whom the debtor's pre-bankruptcy promise (such as a promise to pay money) is broken. Beyond that, the Bankruptcy Code leaves the consequences of the breach to applicable non-bankruptcy law.

A. The Rejection of a Contract Under Section 365(a) Is a Breach.

Insolvent debtors in bankruptcy are, by definition, unable to satisfy all of their obligations. The Bankruptcy Code must thus determine the consequences of claims for breach of contract, whether in liquidation or reorganization. Where the obligation is the payment of a debt, that question is answered by the claims allowance process. 11 U.S.C. §§101(5), 501, 502, 503, 506, 507. Where contract obligations of the debtor ("claims" of creditors) are intertwined with conditional obligations of non-debtors ("assets"), the allocation of those rights and obligations is handled by Section 365.

The term "rejection," is forward-looking; it effectuates the debtor's decision not to perform its future obligations under contract. As such, and by the terms of the statute, rejection is equivalent to a contractual breach—nothing more, nothing less. As a general matter, Section 365 gives the debtor the choice between performance and breach. If the debtor elects to breach (*i.e.*, "rejects" the contract), Section 365(g) treats that breach as a pre-petition claim for damages that can be discharged: "[T]he rejection of an executory contract ... of the debtor constitutes a breach of

such contract." 11 U.S.C. §365(g). Alternatively, where the debtor wishes to bind the non-debtor and receive the benefit of its remaining performance, the debtor can reaffirm its own obligations (*i.e.*, "assume" the contract) and perform. This allows the debtor to preserve valuable contracts for the benefit of the bankruptcy estate. Thus, rejection is a breach while assumption is a reaffirmation of the obligation to perform. Neither act disturbs or unwinds any previous performance under the contract. Nor does it reclaim any value conferred or any property already transferred.

This case involves an agreement that includes a trademark license—the contractual grant of a right to sell trademarked goods under the terms of that license. The debtor/licensor rejected that agreement. The question is whether the rejection deprived the licensee of the right it had already been granted to sell trademarked goods, or, put another way, whether it revoked the licensee's defense against any claim of infringement by any other party. The key point relevant to that question is that the debtor/licensor's rejection of a license agreement constitutes a failure to perform *by the debtor*—a breach of the *licensor's* obligations under the agreement, and nothing more. It is not a revocation or rescission of the contract. It does not retroactively invalidate either the grant of the license or the resulting defense the licensee holds against an infringement action by anyone else.

Simple examples illustrate the importance of this distinction. Consider a solvent merchant who sells a laptop along with warranties and a service contract, delivers the laptop, and then breaches by failing to

perform the ongoing warranties and/or service obligations. The breach would not "unsell" the laptop. Similarly, if the seller were to file for bankruptcy, rejection of the contract by the seller/debtor would free the debtor of its warranty obligations under the service contract (while creating a pre-petition claim for damages by the purchaser), but it would not undo the sale and entitle the debtor to get the laptop back.

A trademark license similarly grants the licensee the right to use the trademark under certain conditions and a defense against an infringement lawsuit brought by anyone (including non-parties) for any covered use.[4] The licensor may have other ongoing obligations, too—akin to the service and warranty obligations above—but if the licensor fails to perform on those obligations under the license (*i.e.*, "breaches"), the license will nonetheless continue to operate as a defense against any claim of infringement, provided that the licensee continues to live up to its own obligations under the license.

The same result is specified by Section 365(g) if the breach occurs through rejection in the bankruptcy context; the debtor/licensor's rejection is simply given effect as a breach of the debtor's obligations under the license agreement as of the bankruptcy petition date. This assures that the licensee will have an allowed claim that receives any *pro rata* distribution, along with other unsecured creditors, but it most certainly does not retract the grant of the license. As with the laptop, the effects of the licensor's breach on the licensee's rights and obligations are determined under non-bankruptcy law and not altered by the Bankruptcy

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[4] A defense against a claim of counterfeiting, for example.

Code. That simple, intuitive conclusion is the sole import of Section 365(g).

That conclusion follows from the principle, reflected in this Court's decision in *Butner v. United States*, 440 U.S. 48, 55 (1979), that "[p]roperty interests are created and defined by [applicable non-bankruptcy law] unless some federal interest requires a different result." Indeed, as the Petitioner explains, Pet. Br. 22-29, it is a foundational principle of bankruptcy law that the property rights that come into the bankruptcy estate in the first instance are the "bundle of sticks" that the debtor held prior to the bankruptcy. *See Board of Trade of City of Chi. v. Johnson*, 264 U.S. 1 (1924). It does not include sticks transferred prior to bankruptcy, and rejection does not operate to return those sticks to the bundle.[5]

B. There Is Academic Consensus That *Lubrizol* Was Wrongly Decided.

In a number of decided cases, however, the interaction between the debtor's future contract obligations and the settled transfers of rights to non-debtors have become improperly entangled. The result has been case law that is confusing at best and misguided at worst. This case implicates perhaps the most infamous example of both confusion and error, *Lubrizol*

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[5] Once the effect of breach has been determined under non-bankruptcy law, the treatment of any breach claim must be determined under Sections 502, 506, and 507. Whether the breach gives rise to a claim that is dischargeable would be considered under Section 101(5). And, the avoidability of any property rights conveyed prepetition would be determined under Sections 544, 545, 546, 547, 548 and 550. Other principles of bankruptcy law may come into play as well.

Enterprises, Inc. v. Richmond Metal Finishers, Inc., 756 F.2d 1043 (4th Cir. 1985). Indeed, a leading treatise calls *Lubrizol*, "the king of all bad executory contract cases."[6] In that case, the Fourth Circuit ignored the text of Section 365(g) and concluded that rejection of a patent license allowed the debtor/licensor to revoke the right to use a patented process, even if the non-debtor/licensee continued paying under the contract. *Id.* at 1047-48. This rule had the harsh effect of turning a licensee into an infringer, subject to the severe remedies provided for patent infringement, or needing to sign a fresh license to continue a line of business it had already paid to pursue.

Congress quickly acted to correct the error by enacting 11 U.S.C. §365(n) to protect patent and copyright licensees. That subsection reaffirmed the foundational rule that rejection does not terminate a contract counterparty's ability to use property already granted to it under the contract, and addressed the principal types of intellectual property covered by the *Lubrizol* precedent. Section 365(n) made it clear that rejection pursuant to Section 365 could not unmake property rights in technology licenses involving patents and copyrights. Instead, upon rejection by the debtor/licensor, the licensee was given the option to treat the license as terminated or to continue to use the licensed intellectual property and pay royalties (less any damages for the licensor's breach).[7]

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[6] Charles Tabb, *The Law of Bankruptcy* 814 (4th ed. 2016).

[7] It is important to note here that this is precisely the result that would obtain if a debtor were to breach a contract under state law. If the non-debtor's performance were conditioned on the debtor's continuing to perform, the non-debtor would have the

Congress did not expressly specify this same result for breaches of trademark licenses, as trademark rights are not listed in the definition of "intellectual property" contained in 11 U.S.C. §101(35A). But *Lubrizol* did not involve trademarks, so there was no immediate need to act on trademarks. Crucially, Congress reaffirmed the background rule stated in Section 365(g) itself, and therefore the basic principles applicable to other contracts—trademark licenses included.

The Seventh Circuit recognized as much in *Sunbeam Products, Inc. v. Chicago American Manufacturing, LLC*, 686 F.3d 372, 377 (7th Cir. 2012) (Easterbrook, J.). That court affirmed the view that *Lubrizol* had been wrongly decided, and that rejection under Section 365(g) is merely a pre-petition breach. *Sunbeam*, like this case, involved rejection of a trademark license. *Id.* at 374-75. There the court held that, even though Section 365(n) does not mention trademark, Section 365(g) makes it clear that while rejection frees the debtor/licensor of its *own* obligations under the trademark license, it does not reach back to revoke the rights of the licensee to continue to use the trademark pursuant to, and subject to, the terms of the license. *Id.* at 376-77.

The *Sunbeam* court's rejection of *Lubrizol* is consistent with the view of virtually every scholar who has opined on the topic: The power to reject does not give the debtor the unilateral right to take back a property right that has already been transferred. There is a substantial academic literature on this

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option to treat the contract as repudiated, and discontinue its own performance.

point, and an unusual scholarly consensus that predates the Seventh Circuit's *Sunbeam* decision. That consensus remains in place to this day.[8]

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[8] The articles reviewed are collected here: Andrew, *supra*, at 881, 921, 923; Westbrook, *supra*, at 231, 324; J. Dianne Brinson, *Software Distribution Agreements and Bankruptcy: The Licensor's Perspective*, 64 Wash. L. Rev. 499, 513-14 (1989); John J. Fry, *The Rejection of Executory Contracts Under the Intellectual Property Bankruptcy Protection Act of 1988*, 37 Clev. St. L. Rev. 621, 625-26 (1989); Michael T. Andrew, *Executory Contracts Revisited: A Reply to Professor Westbrook*, 62 U. Colo. L. Rev. 1, 8 (1991); Robert T. Canavan, *Unsolved Mysteries of Section 365(n) – When a Bankrupt Technology Licensor Rejects an Agreement Granting Rights to Future Improvements*, 21 Seton Hall L. Rev. 800, 806 (1991); Scott A. Steinberg & Michael A. Gerber, *Software Licensing: Protecting Intellectual Property in Bankruptcy*, 6 J. Bankr. L. & Prac. 535, 539 (1997); Alison J. Winick, *Can Superstars Really Sing the Blues? An Argument for the Adoption of an Undue Hardship Standard When Considering Rejection of Executory Personal Services Contracts in Bankruptcy*, 63 Brook. L. Rev. 409, 420 (1997); Shubha Ghosh, *The Morphing of Property Rules and Liability Rules: An Intellectual Property Optimist Examines Article 9 and Bankruptcy*, 8 Fordham Intell. Prop. Media & Ent. L.J. 99, 146, 149 (1997); Richard M. Cieri, Neil P. Olack & Joseph M. Witalec, *Protecting Technology and Intellectual Property Rights When a Debtor Infringes on Those Rights*, 8 Am. Bankr. Inst. L. Rev. 349, 355-56 (2000); Xuan-Thao N. Nguyen, *Bankrupting Trademarks*, 37 U.C. Davis L. Rev. 1267, 1286-87 (2004); Grant Hanessian, Michael A. Stoker & Joseph Samet, *When Worlds Collide: Intellectual Property and Arbitration Rights in Bankruptcy Cases*, 59-Oct. Disp. Resol. J. 27, 28-29 (2004); Peter S. Menell, *Bankruptcy Treatment of Intellectual Property Assets: An Economic Analysis*, 22 Berkeley Tech. L.J. 733, 767-68 (2007); Jonathan C. Balfus, *Exide Inside Out: New Third Circuit Decision Preserves Trademark Licensee's Rights Following Licensor's Rejection Under Bankruptcy Code § 365*, 31 Cal. Bankr. J. 523, 525 (2010); Ron E. Meisler, Elaine D. Ziff, Tracy C. Gardner & Carl T. Tullson, *Rejection of Intellectual*

Shortly after *Lubrizol* was decided, professors Westbrook and Andrew wrote a series of influential articles that explained why, as a matter of statutory interpretation, history, and policy, the effect of rejection is simply to create a breach and to make that breach effective as of the moment before the petition. *See* Westbrook, *supra*; Andrew, *supra*. Section 365(g) says so, in so many words. While Westbrook and Andrew each took different routes to this result, they agreed that once a debtor files for bankruptcy, the trustee or debtor-in-possession has the obligation to decide whether it would be more beneficial to the estate for

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Property License Agreements Under Section 365(n) of the Bankruptcy Code: Still Hazy After All These Years, 19 J. Bankr. L. & Prac. 2 Art. 4, at 1 (2010); Bradley Scott Friedman, *Taking the Intellectual Out of Intellectual Property Licenses Under Section 365 of the Bankruptcy Code*, 20 J. Bankr. L. & Prac. 6 Art. 3, at 4 (2011); Jonathan C. Bolton & Martin S. Loui, *Intellectual Property Considerations in Times of Financial Distress*, 17-Feb. Haw. B.J. 4, 6 (2013); Zachary S. McKay, *A Dramatic Misconception: Why the Trademark Licensee Must Be Granted the Power to Overcome the Trustee in Bankruptcy's 11 U.S.C. § 365 Rejection*, 54 S. Tex. L. Rev. 747, 774-75 (2013); Peter M. Gilhuly, Kimberly A. Posin & Ted A. Dillman, *Intellectually Bankrupt?: The Comprehensive Guide to Navigating IP Issues in Chapter 11*, 21 Am. Bankr. Inst. L. Rev. 1, 36-37 (2013); Alan N. Resnick, Sunbeam *Offers a Ray of Sunshine for the Licensee When a Licensor Rejects a Trademark License Agreement in Bankruptcy*, 66 SMU L. Rev. 817, 821, 839 (2013); Tyler S. Dischinger, *Problems in the Code, Section 365(n): A Call for Clarity*, 32-8 Am. Bankr. Inst. J. 50, 51 (2013); Jason Enright, *The Bankruptcy Code's Rejection of Trademark Under § 365(n) and the Motley Consequences When a Debtor Rejects a High-Tech Trademark License*, 1 Bus. & Bankr. L.J. 75, 84-85 (2014); Peter C. Blain, *Trademarks and Distribution Rights in Bankruptcy: The Dissonance Continues*, 29 No. 3 Intell. Prop. & Tech. L.J. 10, 12-13 (201); Westbrook & White, *supra*, at 554.

the debtor to perform or breach a contract. *See* Westbrook, *supra*; Andrew, *supra*. This is true as a simple matter of logic.[9] As Andrew puts it, "[r]ejection of the contract by the estate—the estate's decision not to assume—is not a rescission or cancellation of the contract. It is merely the estate's decision not to become obligated on it." Andrew, *supra*, at 921 (footnote omitted). Or, as Westbrook (more functionally) puts it, the bankruptcy terms "assumption and rejection represent the *decision* to perform or breach."[10]

The question then becomes: what are the consequence of that failure to perform? If the debtor "rejects," any claim for damages from the resulting breach is treated as a pre-petition claim.[11] The claimant then shares in any distribution to creditors, through the ordinary claims-administration process, *see* 11 U.S.C. §502, and the claim is discharged, *see id.*

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[9] Indeed, a recent article argues that, as a practical matter, Section 365 might not even be necessary to administer the consequences of rejection. *See* John A.E. Pottow, *A New Approach to Executory Contracts*, 96 Tex. L. Rev. 1437 (2018). This Court need not go that far, but the argument illustrates the extent to which the *Lubrizol* approach deviates from the underlying principles of the Bankruptcy Code.

[10] Westbrook, *supra*, at 231.

[11] 11 U.S.C. §365(g). Rejection is the estate's determination "not to assume the contract or lease, and its occurrence triggers the ancillary rule that a 'breach' of the debtor's obligations will be deemed to have occurred as of the commencement of bankruptcy, thus permitting a claim by the non-debtor." Andrew, *supra*, at 881; *see also* Michael T. Andrew, *Executory Contracts Revisited: A Reply to Professor Westbrook*, 62 U. Colo. L. Rev. 1, 8 (1991) ("Rejection has the consequence of creating a deemed breach of the contract as of the date of bankruptcy so that there will be no question but that the non-debtor party has a claim" for breach of contract, and "whether the contract is 'executory' or not, the result" of rejection creates a claim against the estate.).

§524. Westbrook and Andrew also both agree that any further consequences of the breach should be determined by applicable *non*-bankruptcy law (principally, state contract law). This is why *Lubrizol* was wrongly decided; it made the consequence of rejection a bankruptcy-specific question. Andrew, *supra*, at 916-18; Westbrook, *supra*, at 305-11.

A critical consequence of Westbrook and Andrew's analysis is that, but for *Lubrizol*, Section 365(n) would have been entirely unnecessary. Since rejection is breach, not revocation, rejection would not rescind the license. As Andrew and Westbrook noted, there is no federal bankruptcy law answer to the question of what happens to a license when the debtor breaches. Instead, one would look to applicable non-bankruptcy law—to the law of trademark and contract and to the terms of the license—to determine the consequences of the licensor's failure to perform its ongoing obligations. In simple terms, the consequences of breaching a trademark license are ordinary questions of contract interpretation, not federal bankruptcy law. Congress enacted Section 365(n) to correct *Lubrizol*'s misunderstanding of that basic principle for copyright and patent—the property covered by the *Lubrizol* precedent. Trademark licensees are not included in that provision, but neither were they covered by *Lubrizol*; legislative correction was, therefore, unnecessary. In sum, the basic principle, stated in Section 365(g) that rejection is breach—reaffirmed in Section 365(n)—means that rejection does not terminate or rescind a trademark license any more than any other type of intellectual property license.

The remarkable thing is that in the twenty years since Westbrook and Andrew wrote, there has been

virtually no scholarly disagreement on this point. The literature is collected above in note 8, but the point is that, with the exception of one article cited by the First Circuit, nobody disagrees. *See* James M. Wilton & Andrew G. Devore, *Trademark Licensing in the Shadow of Bankruptcy*, 68 Bus. Law. 739, 771-76 (2013).[12] For historical reasons articulated by Andrew and statutory and policy reasons articulated by Westbrook, rejection simply constitutes a breach—nothing more, and certainly not a revocation of the entire contract.

As the foregoing suggests, the Bankruptcy Appellate Panel (BAP) correctly decided this issue before the First Circuit's decision created the split this Court needs to resolve. The leading scholars have recognized as much. Recently, Professor Westbrook specifically addressed this case, and wrote approvingly of the BAP's opinion:

> [The BAP's opinion in] *In re Tempnology LLC*, supports the reasoning behind our approach. ... The [BAP] concluded that while trademarks and logos could not be retained as intellectual property under section 365(n) of the Code, the bankruptcy court erred in concluding that Mission had no rights in the trademarks and logos after rejection. Rejection did

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[12] There, the authors principally argue that the Andrew article ought to be disregarded because it is old. They then argue that trademarks are different from other forms of IP, which nobody disputes. They make no argument, however, as to why their trademark-specific concerns are best addressed by a *bankruptcy*-specific rule, let alone why they are well served by the *Lubrizol* approach. If Congress intended a breach to operate as the rescission of a trademark license, that would be more appropriately accomplished under trademark law, not as a bankruptcy-specific rule of rescission.

> not vaporize these rights that were not addressed by section 365(n). Instead, "[w]hatever postrejection rights Mission retained in the Debtor's trademark and logo are governed by the terms of the Agreement and non-bankruptcy law." As we might put it, breach of contract (rejection's effect under section 365(g)) would not somehow entitle the debtor to void its original grant of rights under nonbankruptcy law, although it did permit the avoidance of various ongoing obligations.

Westbrook & White, *supra*, at 532-33 (footnotes omitted).

The *Sunbeam* decision similarly recognized that rejection does not claw back a non-debtor's already transferred property rights. In contrast, *Lubrizol* and the First Circuit's decision in this case create an avoidance power where there was no congressional intent to do so.

C. The First Circuit's Approach Should Be Rejected.

Notwithstanding the foregoing, Congress's omission of a specific rule governing trademarks from Section 365(n) has led to confusion in the lower courts—and now a clear circuit split—about the continued vitality of *Lubrizol* for trademarks.

Some lower courts had concluded that, because trademarks were omitted from Section 101(35A) and hence lie beyond the scope of Section 365(n), the rule of *Lubrizol* continued to control cases involving the rejection of trademark licenses. *See In re HQ Global Holdings, Inc.*, 290 B.R. 507, 513 (Bankr. D. Del. 2003); *see also In re Old Carco LLC*, 406 B.R. 180, 211

(Bankr. S.D.N.Y. 2009); *In re Centura Software Corp.*, 281 B.R. 660, 668-74 (Bankr. N.D. Cal. 2002); *In re Blackstone Potato Chip Co.*, 109 B.R. 557, 560 (Bankr. D.R.I. 1990). This approach is surprising because, even for the property rights specifically at issue in *Lubrizol*, that precedent never controlled outside the Fourth Circuit.

Meanwhile, other lower courts had correctly focused on the effect of a breach under trademark law, leaving the non-debtor licensees' trademark rights in place. *In re Crumbs Bake Shop, Inc.*, 522 B.R. 766, 772 (Bankr. D.N.J. 2014). These lower courts were following the Seventh Circuit in *Sunbeam,* which declined to extend *Lubrizol*'s reasoning to cover trademarks. *Sunbeam*, 686 F.3d at 375-77. The latter approach should now be definitively adopted by this Court.

Notably, while it is possible to take the wrong view from the fact that trademarks were excluded from the effect of Section 365(n), the legislative history supports the correct approach—the one taken in *Sunbeam*. Congress noted that *Lubrizol* did not apply to trademarks, and therefore did not overrule it. But that is not because it thought that it might be wise to create a bankruptcy-specific rule like *Lubrizol*'s for trademarks or any other rights. Instead, when Congress overruled *Lubrizol*, it expressly left the question of the effect of breach *under trademark law* to be fleshed out in the courts. It would be fairly perverse to read Congress's decision *not* to create or endorse any bankruptcy-specific rule as in fact endorsing one.

The Senate Report says this explicitly:

> [T]he bill does not address the rejection of executory trademark, trade name or service

> mark licenses by debtor-licensors. While such rejection is of concern because of the interpretation of section 365 by the *Lubrizol* court and others, ... such contracts raise issues beyond the scope of this legislation. In particular, trademark, trade name and service mark licensing relationships depend to a large extent on control of the quality of the products or services sold by the licensee. Since these matters could not be addressed without more extensive study, it was determined to postpone congressional action in this area and to allow the development of equitable treatment of this situation by bankruptcy courts.

S. Rep. No. 100-505, at 5 (1988).

It is important to understand the logic behind this move. As the Senate Report notes, trademarks, trade names and service marks raise similar issues to other forms of intellectual property, but also present important differences that arise from the association of the trademark with the debtor/licensor's goodwill. So Congress left it to courts to apply Section 365(g) and then determine the effect of the "breach" that a rejection creates—in the context of individual contractual agreements, applying the *non*-bankruptcy law of trademark where cases and commentary are devoted to the special needs of such contracts. Put another way, Congress wanted this area of the law to continue to develop as a matter of *non*-bankruptcy law, and so declined to supplant the governing substantive law with a uniform bankruptcy answer. Reading Section 365(n)'s omission of trademarks as *supplying* a uniform rule of revocability for trademark licenses not

only overreads an omission, it gets the point of that omission exactly backwards.[13]

As the BAP found below, and the Seventh Circuit found in *Sunbeam*, a contractual breach does not vaporize a trademark license, either as a matter or trademark or contract law. Accordingly, neither does rejection under Section 365.

In sum, the disagreement between the circuits admits of a fairly straightforward answer—indeed one that has been the subject of decades of academic agreement—that is well laid out in the Seventh Circuit's decision in *Sunbeam*. By clearly stating that the effect of rejection is breach, using the language of Section 365(g) itself, this Court will align bankruptcy law with the non-bankruptcy policies of trademark and contract law. In so doing, it will also increase commercial certainty and protect the legitimate expectations of debtors and non-debtors alike.

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[13] The court below supplied no substantial authority in the trademark cases for the "vaporization" of trademark licenses arising from the breach of such licenses by grantors.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the First Circuit.

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December 17, 2018

APPENDIX

APPENDIX

Amici, whose names and affiliations are set forth below, are law professors who study the United States' bankruptcy system and subscribe to the views stated in this amicus brief. They write solely based on their concern about the effect that the opinion below will have on this system. To the best of their knowledge, none of them have any financial interest in the outcome of this case:

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No. 17-1657

IN THE
Supreme Court of the United States

MISSION PRODUCT HOLDINGS, INC.,

Petitioner,

v.

TEMPNOLOGY, LLC, N/K/A OLD COLD LLC,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTION PRESENTED

Whether, under §365 of the Bankruptcy Code, a debtor-licensor's "rejection" of a license agreement - which "constitutes a breach of such contract," 11 U.S.C. §365(g) - terminates rights of the licensee that would survive the licensor's breach under applicable non-bankruptcy law.

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

This amicus curiae brief is submitted on behalf of the New York Intellectual Property Law Association ("the NYIPLA"). The NYIPLA is a professional membership association of approximately 1,000 attorneys in the New York City metropolitan area whose interests and practices lie in the areas of patent, trademark, copyright, trade secret, and other intellectual property law.[1]

The NYIPLA's members include a diverse array of attorneys specializing in trademark law, including in-house counsel for businesses that own, license, enforce, and challenge trademarks, as well as attorneys in private practice who advise a wide array of clients on trademark matters, including trademark licensing, and procurement of trademark registrations through the U.S. Patent and Trademark Office. Many of the NYIPLA's member attorneys participate actively in trademark litigation, representing both owners and alleged infringers. The NYIPLA, its members, and the clients of its members, share an interest in having the standards governing the enforceability of trademark licenses be reasonably clear and predictable.

The arguments in this brief were approved on December 6, 2018 by an absolute majority of the total number of officers and members of the Board of the NYIPLA (including such officers and Board members who did not vote for any reason including recusal), but

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, or its counsel, made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

do not necessarily reflect the views of a majority of the members of the Association or of the firms or other entities with which those members are associated.

No party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel contributed money that was intended to fund the preparation or submission of this brief.

After reasonable investigation, the NYIPLA believes that no member of the Board or Amicus Briefs Committee who voted to prepare this brief on its behalf, or any attorney in the law firm or corporation of such a Board or Committee member, or attorney who aided in preparing this brief, represents either party to this litigation. Some Committee or Board members or attorneys in their respective law firms or corporations may represent entities that have an interest in other matters which may be affected by the outcome of this litigation.

SUMMARY OF ARGUMENT

Section 365(a) of the Bankruptcy Code allows a debtor to assume or reject an executory contract. 11 U.S.C. §365(a). Typically, rejection is undertaken by a trustee or debtor in possession where such action will benefit the bankruptcy estate and assist the debtor in achieving the benefits of bankruptcy. When a debtor rejects an executory agreement, then under Section 365(g), it is treated as a pre-petition breach of that agreement and allows the non-breaching party to file a claim for pre-petition damages.

Section 365(g), however, does not provide that the rejected executory agreement is terminated. Where Congress wanted to authorize the termination of executory agreements upon their rejection, it expressly provided for such termination in the Bankruptcy Code. Congress did no such thing with respect to trademark license agreements. Accordingly, the application of well-established rules of statutory construction requires the conclusion that the rejection of an executory trademark licensing agreement under Section 365(g) does not result in its termination.

Only executory contracts can be rejected under Section 365(a). A contract is executory when both parties have unperformed obligations, measured as of the commencement of the bankruptcy case, that would constitute a material breach if such obligations are not performed. *N.L.R.B. v. Bildisco & Bildisco,* 465 U.S. 513, 522 n.6 (1984). This Court has long recognized, since its decision in *Waterman v. Mackenzie*, 138 U.S. 252 (1891), that a determination of whether an intellectual property interest has been assigned must be based on the legal effect of the assignment or license - not on the name of the document. Where, in a trademark license agreement, all substantial rights in a trademark are transferred to the licensee, the license agreement is an assignment of the trademark. In that case, the license agreement is not an executory agreement subject to rejection under Section 365(a) because the licensor, post-assignment, has no remaining unperformed obligations.

Finally, regardless of any provision in the license agreement, the owner of a trademark is under

an obligation to monitor and police the use of the trademark. Allowing the licensee to continue to use the licensed trademarks post-rejection does not raise any quality control concerns. At the outset, the licensee would have to comply with any quality control obligations set forth in the license agreement. Further, while the licensor may reject the license agreement, the licensor cannot avoid its obligation to maintain quality control over the licensor's trademarks. In all events, maintaining quality control over the licensed trademarks post-rejection is in the licensor's best interest, as it will preserve, for the benefit of the bankruptcy estate, the value of the licensor's intellectual property.

BACKGROUND

On November 21, 2012, Petitioner Mission Product Holdings, Inc. ("Mission") entered into a Co-Marketing and Distribution Agreement ("the Agreement") with Respondent Tempnology LLC ("Tempnology") to source, co-market, and distribute a series of cooling products ("the Cooling Accessories") produced by Tempnology. *Mission Prod. Holdings, Inc. v. Tempnology, LLC (In re Tempnology, LLC)*, 879 F.3d 389, 392 (1st Cir. 2018). The Agreement granted Mission a non-exclusive, worldwide, perpetual license to use Tempnology's products, inventions, and designs, and the rights to Tempnology's intellectual property with respect to those products, excluding trademarks and domain names ("the Worldwide License"). *Id.* at 393. The Agreement also gave Mission a non-exclusive, worldwide license to use Tempnology's trademarks on the products Mission distributed. *Id.*

Additionally, the Agreement granted Mission an exclusive license ("the Exclusive License") to sell a subset of the products ("the Exclusive Cooling Accessories") by preventing Tempnology from selling or licensing them to others within a narrower territory - primarily, the United States. *Id.* Effectively, the Agreement as a whole gave Mission the non-exclusive right to sell certain Tempnology products throughout the world, and the exclusive right to sell a subset of those products within the United States. *Id.* at 392-93.

The Agreement allowed either party to terminate the contract without cause, triggering a two-year Wind-Down Period during which the Agreement would remain in full effect. *Id.* at 393. On June 30, 2014, Mission terminated the Agreement, triggering the two-year Wind-Down Period. *Id.* A month later, Tempnology issued a notice of termination for cause on July 22, 2014, alleging Mission's violation of the Agreement and failure to perform its obligations. *Id.*

The parties then entered into arbitration. *Id.* The arbitrator determined that the Agreement would remain in full force and effect until its termination on July 1, 2016 at the conclusion of the Wind-Down Period. *Id.*

Prior to the termination of the Wind-Down Period, on September 1, 2015, Tempnology filed a Chapter 11 petition and sought to reject the Agreement. *Id.* at 393-94. Mission objected to Tempnology's motion to reject the Agreement, arguing that Mission should be allowed to retain both its intellectual property license and exclusive distribution rights. *Id.* at 394.

The Bankruptcy Court ultimately granted Tempnology's rejection motion, "subject to Mission Product Holdings' election to preserve its rights under 11 U.S.C. §365(n)." *Id.* After seeking further clarification, the Bankruptcy Court concluded that the trademark license was not protected from rejection. *Id.*

Mission then filed a notice of appeal to the Bankruptcy Appellate Panel for the First Circuit ("the BAP"). *Id.* at 395. On November 18, 2016, the BAP affirmed in part and reversed in part the Bankruptcy Court Opinion and Order. *Mission Prod. Holdings v. Tempnology, LLC (In re Tempnology, LLC)*, 559 B.R. 809, 811 (B.A.P. 1st Cir. 2016). The BAP concluded that "[Tempnology's] rejection of the Agreement did not vaporize Mission's trademark rights under the Agreement. Whatever post-rejection rights Mission retained in the Debtor's trademark and logo are governed by the terms of the Agreement and applicable non-bankruptcy law." *Id.* at 822-23.

On appeal, the First Circuit disagreed with the BAP in part and affirmed the Bankruptcy Court in full, holding that Section 365(n) "[did] not apply to Mission's right to be the exclusive distributor of Debtor's products, or to its trademark license." *In re Tempnology, LLC*, 879 F.3d at 395. The court held that Tempnology's rejection terminated Mission's trademark rights, recognizing that the omission of trademarks from the Bankruptcy Code's definition of "intellectual property" in Section 365(n) was not dispositive of the question, which turned on "exactly what rejection means" under section 365. *Id.* at 401-02. On that issue, the opinion parted ways with *Sunbeam Prods., Inc. v. Chicago Mfg., LLC*, 686 F.3d

372 (7th Cir. 2012) and instead endorsed the Fourth Circuit's reasoning in *Lubrizol Enters., Inc. v. Richmond Metal Finishers, Inc.*, 756 F.2d 1043 (4th Cir. 1985), holding that rejection stripped Mission of its right to use Tempnology's trademarks, leaving it with only a pre-petition damages claim. *Id.* at 402-05.

On October 26, 2018, the Supreme Court granted Mission Products Holdings, Inc.'s Petition for a Writ of Certiorari in the above matter to answer the question:

> Whether, under §365 of the Bankruptcy Code, a debtor-licensor's "rejection" of a license agreement - which "constitutes a breach of such contract," 11 U.S.C. §365(g) - terminates rights of the licensee that would survive the licensor's breach under applicable non-bankruptcy law.

ARGUMENT

I. The Plain Language Of Sections 365(g) And 365(n) Precludes A Construction Of "Rejection" Of Trademark Licenses As The Equivalent Of Termination Under Which Licensees Would Lose Their Rights To Use The Licensed Marks

Where trademark license agreements are executory, under Section 365 of the Bankruptcy Code, 11 U.S.C. §365, they are subject to assumption or rejection by the trustee (or a debtor in possession holding the rights of a trustee). The statute expressly states that rejection is treated as a *breach* of the license. Except for five subsections where the

word "terminate" appears for limited purposes, Section 365 nowhere, directly or indirectly, equates rejection with termination as it relates to contracts generally, including a trademark license under which a debtor is the licensor.

By treating rejection of a trademark license, under which the debtor is the licensor, as the legal or functional equivalent of termination, the First Circuit misread the statute, defied its plain language, ignored Congress' explicit intentions, and incorrectly deprived the licensee of its non-bankruptcy rights as the aggrieved party harmed by the debtor's rejection - breach - of the license. The court wrongly engrafted onto Section 365(g) a wholly implied concept of "termination" favoring the trustee or debtor - notwithstanding that rejection is statutorily deemed to be a breach by that party - to justify recovery of the licensed rights solely to realize pecuniary benefit for the bankruptcy estate through a sale or new license to a third party. That holding should be reversed.

A. The Plain Language Of Section 365 Treats Rejection Of An Executory Contract As A Breach, Not Termination, Of The Contract

Section 365(a) of the Bankruptcy Code permits the trustee (or debtor in possession), subject to the bankruptcy court's approval, to "assume or reject any executory contract or unexpired lease of the debtor." 11 U.S.C. §365(a). Section 365(g) provides, as a general matter in bankruptcy cases, that "the *rejection of an executory contract* or unexpired lease of the debtor *constitutes a breach of such contract* or lease . . . immediately before the date of the filing of

the petition." *Id.* at §365(g)(1) (emphasis added). Section 365(g) does not contain any reference to a "termination;" four other subsections of Section 365, however, do include the term "terminate" in the specific context of affording to non-debtor parties to rejected contracts the right either to treat their contracts as terminated, or to retain their bargained-for rights for the remaining duration of the contracts. *See* Point I(B) below.[2]

Section 365(g) neither expressly terminates the contract nor gives the trustee (or debtor in possession) any right to terminate the contract. Further, Section 365(g) nowhere requires the non-debtor party to surrender all rights held under the rejected (breached) contract. The text of Section 365 signifies that, because it does not use the word "terminate" or "termination" to specify the effect of rejection, the court-approved act of rejection cannot be treated as anything more than a breach of contract. Rejection cannot divest the non-debtor party of its rights unless that party obtains relief from the automatic bankruptcy stay and then elects, of its own volition, to terminate the contract.

"The task of resolving the dispute over the meaning of [a statute] begins where all such inquiries must begin: with the language of the statute itself . . . . [Where] the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'" *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (citations

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[2] The fifth subsection, in which the word "terminate" appears, Section 365(e), renders unenforceable a so-called *ipso facto* clause that would otherwise operate to terminate a contract because of the debtor's filing of a bankruptcy petition.

omitted). Thus, when the statute has a straightforward interpretation, a court should not change its meaning by injecting additional terms. *See, e.g., Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'") (citations omitted); *Lamie v. United States Trustee*, 540 U.S. 526, 537-38 (2004) (courts should not add "absent words" to a statute, especially where there is a "plain, non-absurd reading in view"). Moreover, "[w]here Congress included particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Bates v. United States*, 522 U.S. 23, 29-30 (1997).

The terms "reject" and "rejection" in Sections 365(a) and (g) are terms of bankruptcy art; neither section speaks about "termination" of an executory license. Rejection simply relieves the debtor's estate of its obligations under the contract, and "does not embody the contract-vaporizing properties so commonly ascribed to it . . . . Rejection merely frees the estate from the obligation to perform; it does not make the contract disappear." *Thompkins v. Lil' Joe Records, Inc.*, 476 F.3d 1294, 1306 (11th Cir. 2007) (*quoting Cohen v. Drexel Burnham Lambert Grp., Inc. (In re Drexel Burnham Lambert Grp., Inc.)*, 138 B.R. 687, 703 (Bankr. S.D.N.Y. 1992)); *see* M. Andrew, *Executory Contracts in Bankruptcy: Understanding "Rejection,"* 59 U. COLO. L. REV. 845, 931 (1988) ("rejection is a bankruptcy estate's election to decline a contract or lease asset . . . . That

decision leaves the non-debtor in the same position as all others who have dealt with the debtor, by giving rise to a presumption that the debtor has 'breached' - i.e., will not perform - its obligations. The debtor's obligations are unaffected, and provide the basis for a claim.").

To our knowledge, the First Circuit, in its decision below, is the only circuit to reach a contrary conclusion on the effect of rejection since the statutorily-discredited 1985 decision of the Fourth Circuit in *Lubrizol Enters., Inc. v. Richmond Metal Finishers, Inc.*, 756 F.2d 1043 (4th Cir. 1985). In *Lubrizol*, the Fourth Circuit ruled that a debtor-licensor's rejection of a patent license terminated the licensee's right to continue to practice the patent. That decision no longer carries persuasive weight inasmuch as Congress, in adopting Section 365(n) of the Bankruptcy Code, specifically intended to reverse the effect of the ruling as it related to patents, in particular, and certain other classes of intellectual property. S. REP. No. 100-505, 100th Cong., 2d Sess. at 2-3 (1988).[3]

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[3] Nevertheless, some courts continue to hold, through negative inference, that the omission of trademarks from the definition of intellectual property contained in 11 U.S.C. §101(35A) reflected Congress' intention for *Lubrizol* to control the rejection of a trademark license. *E.g., In re HQ Global Holdings, Inc.*, 290 B.R. 507, 513 (Bankr. D. Del. 2003); *Raima UK Ltd. v. Centura Software Corp. (In re Centura Software Corp.)*, 281 B.R. 660 (Bankr. N.D. Cal. 2002) (under the plain language of the statute, trademark licenses are not included in section 365(n); as a result of rejection, the debtor's affirmative obligation to allow the licensee to use the mark is excused, and the counterparty is left only with a damage claim under Section 365(g)).

Those courts overlooked the overall structure and meaning of Section 365 and its exceptions, and analyzed only the equities

The majority of the circuits that have addressed the question agree that rejection of a contract under Sections 365(a) and (g) operates simply as a material breach and not as termination altogether. Rejecting a contract is not "'the functional equivalent of a rescission, rendering void the contract and requiring that the parties be put back in the positions they occupied before the contract as formed.' It 'merely frees the estate from the obligation to perform' and 'has absolutely no effect upon the contract's continued existence.'" *Sunbeam Prods., Inc.*, 686 F.3d at 376 (*quoting Thompkins*, 476 F.3d at 1306); *accord Miller v. Chateau Cmtys. Inc. (In re Miller)*, 282 F.3d 874, 877-78 (6th Cir. 2002); *Medical Malpractice Ins. Ass'n v. Hirsch (In re Lavigne)*, 114 F.3d 379, 386-87 (2d Cir. 1997) ("While rejection is treated as a breach, it does not completely terminate the contract."); *Enterprise Energy Corp. v. United States (In re Columbia Gas Sys. Inc.)*, 50 F.3d 233, 239 n.8 (3d Cir. 1995) (rejection "is equivalent to a nonbankruptcy breach"); *Eastover Bank for Sav. v. Sowashee Venture (In re Austin Dev. Co.)*, 19 F.3d 1077, 1082 (5th Cir. 1994) ("the terms rejection, breach and termination are used differently [in Section 365], but not inconsistently or interchangeably, as some courts have suggested."); *Koplow v. P.M. Holding, Inc. (In re Modern Textile,*

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from the perspective of the bankruptcy estate without coming to grips with the general rule of Section 365(g) - as recognized by the Courts of Appeals without exception other than *Lubrizol* and the decision on review here - that rejection under Section 365(a) is not termination.

Inc.), 900 F.2d 1184, 1191 (8th Cir. 1990).[4] *See also In re Exide Techs.*, 607 F.3d 957, 965-68 (3d Cir. 2010) (Ambro, J., concurring) (reasoned discussion of proposition that rejection is only a breach, not a termination, of the contract or license).

Leading commentaries on the Bankruptcy Code endorse this view. *See* 3 COLLIER ON BANKRUPTCY ¶ 365.10[3] (A. Resnick & H. Sommer eds. 16th rev. ed. 2018); 2 NORTON BANKR. L. & PRAC. 3D §46:7 (W. Norton Jr. & W. Norton III eds. 2018).

B. Congress Recognized How To Treat Rejection As Termination In Four Subsections Of Section 365, None Of Which Applies To Trademark Licenses Or Grants A Right Of Termination To The Bankruptcy Trustee Or Debtor

Over the years, Congress enacted four exceptions to the general effect of rejection in Section 365. Each exception provides special protection to a limited range of non-debtor counterparties by giving them (but not the trustee or debtor in possession) rights either to terminate the rejected contracts or to

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[4] *See also COR Route 5 Co. v. Penn Traffic Co. (In re Penn Traffic Co.)*, 524 F.3d 373, 378 (2d Cir. 2008) ("Rejection is not the equivalent of rescission because rejection under 11 U.S.C. §365(a) simply means that the court will permit the debtor to breach the contract, with the result that the contractual obligations will be reduced to general unsecured claims for prepetition damages pursuant to 11 U.S.C. §365(g)(1)." (*quoting In re Child World, Inc.*, 147 B.R. 847, 852 (Bankr. S.D.N.Y. 1992)); *O'Neill v. Continental Airlines, Inc. (In re Continental Airlines)*, 981 F.2d 1450, 1459 (5th Cir. 1993) ("To assert that a contract effectively does not exist as of the date of rejection is inconsistent with deeming the same contract breached.").

retain their rights for the remaining contract term:

- Section 365(h)(1): "If the trustee rejects an unexpired lease of real property under which the debtor is a lessor and . . . if the rejection by the trustee amounts to such a breach as would entitle the lessee to treat such lease as terminated . . ., the lessee may treat the lease as terminated by the rejection" or remain in possession for the remaining term. *Id.* at §365(h)(1)(A)-(B).

- Section 365(h)(2): "If the trustee rejects a timeshare interest under a timeshare plan under which the debtor is the timeshare interest seller and . . . if the rejection amounts to such a breach as would entitle the timeshare interest purchaser to treat the timeshare plan as terminated . . ., the timeshare interest purchaser under the timeshare plan may treat the timeshare plan as terminated by such rejection" or retain its rights for the remaining term. *Id.* at §365(h)(2)(A)-(B).

- Section 365(i): "If the trustee rejects an executory contract of the debtor for the sale of real property . . . under which the purchaser is in possession, such purchaser may treat such contract as terminated" or remain in possession. *Id.* at §365(i)(1).

- Section 365(n): "If the trustee rejects an executory contract under which the debtor is a licensor of a right to intellectual property, the licensee under such contract may elect . . . to treat such contract as terminated by such

> rejection if such rejection by the trustee amounts to such a breach as would entitle the licensee to treat such contract as terminated" or retain its rights for the remaining term. *Id.* at §365(n)(1)(A).

In each case, if the non-debtor elects to retain its rights, it must continue to pay royalties or other amounts coming due to the licensor, and the trustee (or its successor) may not interfere with the non-debtor's continued rights, but the estate is freed from further obligations to the non-debtor.

These exceptions demonstrate that Congress clearly intended to differentiate: (i) rejection under Sections 365(a) and (g) - *i.e.*, relieving the estate of the contracts without terminating them; from (ii) rejection of the four types of contracts summarized above - *i.e.*, relieving the estate of the contracts and *giving the non-debtor the option to terminate them.*

The fact that the Bankruptcy Code uses the word "terminate" in these subsections while conspicuously omitting it from Sections 365(a) and (g) buttresses the conclusion that rejection is not termination: "when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended." *O'Gilvie v. United States*, 516 U.S. 79, 96 (1996) (*quoting* 2A N. Singer, SUTHERLAND ON STATUTORY CONSTRUCTION §46.07 (5th ed. 1992 & Supp. 1996)); *see also Tafoya v. U.S. Dep't of Justice*, 748 F.2d 1389, 1391-92 (10th Cir. 1984) ("We presume that this clear use of different terminology within a body of legislation is evidence of an intentional differentiation.").

Any other interpretation would result in discord among the provisions of Section 365 relating to interpretation of the word "breach." It is a fundamental rule of statutory interpretation that "[a] word or phrase is presumed to bear the same meaning throughout the text . . . ." A. SCALIA & B. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS at 170 (2012); *see Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980) ("In the end, we cannot accept respondent's position without unreasonably giving the word 'filed' two different meanings in the same section of the statute.").

If a "breach" under Section 365(g) is a statutory authorization for a licensor to terminate, then a "breach" under Sections 365(h)(1), 365(h)(2), and 365(n), likewise, would allow the licensor to terminate. The latter provisions, however, plainly do not authorize the licensor to terminate; they only allow the licensee to terminate when the breach is such that would allow the license to terminate.

It is also a fundamental rule of statutory construction that provisions in a statute should, if possible, be read in harmony: "[t]he provisions of a text should be interpreted in a way that renders them compatible, not contradictory." A. SCALIA & B. GARNER at 180.

The authorization in Section 365(g) to "breach" by rejection, read in harmony and compatible with the "breach" authorized by Sections 365(h)(1), 365(h)(2), and 365(n), does not permit termination by the licensor.

That Congress purposely omitted "terminate" from Section 365(g) in describing the effect of

rejection, while using that term in other subsections, demonstrates that it knew how to make rejection a basis for termination – but only by the non-debtor counterparty – and declined to do so for trademark licenses or other non-excepted executory contracts.

C. Absent Treatment Specifically Mandated Under Another Provision, The Effect Of Rejection Of A Trademark License Is Determined Under Section 365(g)

Rejection of a trademark license falls only within the general rule of Sections 365(a) and (g), not within any of the exceptions in Sections (e), (h), (i) or (n). Statutory exceptions are read narrowly to preserve the primary function of the provision. *Commissioner v. Clark*, 489 U.S. 726, 739 (1989) ("In construing [statutes] in which a general statement of policy is qualified by an exception, we usually read the exception narrowly in order to preserve the primary operation of the provision."). Similarly, exceptions "must not be interpreted so broadly as to swallow the rule." *Id.* (*citing Cuomo v. Clearing House Ass'n, L.L.C.*, 557 U.S. 519, 530 (2009)).

A broader judicially-created exception is inappropriate. *See Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980) ("[W]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied . . . ."); *Butner v. United States*, 440 U.S. 48, 55-56 (1979); *see also United States v. Noland*, 517 U.S. 535, 543 (1996). This comports with a controlling canon of statutory interpretation: "[I]t is not, and cannot be, our practice to restrict the unqualified language of a statute to the particular

evil that Congress was trying to remedy - even assuming that it is possible to identify that evil from something other than the text of the statute itself." *Brogan v. United States*, 522 U.S. 398, 403 (1998). Absent a compelling reason, the literal language of a federal statute applies even if it would produce a harsh result for one party in a case. *Burgo v. General Dynamics Corp.*, 122 F.3d 140, 145 (2d Cir. 1997).

Absent explicit inclusion in one or more of the exceptions identified above, rejected trademark licenses fall within the general rejection rule in Section 365(g). "An exception to a 'general statement of policy' is 'usually read . . . narrowly in order to preserve the primary operation of the provision.'" *Maracich v. Spears*, 570 U.S. 48, 61 (2013) (*quoting Clark*, 489 U.S. at 739); *accord United States v. Johnson*, 529 U.S. 53, 58 (2000) ("When Congress provides exceptions in a statute, it does not follow that courts have authority to create others. The proper inference . . . is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth."); *Contreras-Bocanegra v. Holder*, 678 F.3d 811, 817 (10th Cir. 2012) ("As a general principle of statutory interpretation, if a statute specifies exceptions to its general applications, other exceptions not explicitly mentioned are excluded." (citation omitted)).

Accordingly, Congress' specific omission of trademarks from the definition of "intellectual property" covered by the exception in Section 365(n) (*see* Point I(D) below) means that the effect of rejection of such trademark contracts is established only by Section 365(g). Where the breach would entitle them to terminate, licensees of "intellectual

property" rights, as defined by Section 365(n), have the option to terminate the license agreement upon rejection by the debtor. Licensees of trademark rights do not have the statutory option to terminate the license agreement upon rejection by the debtor.

As a matter of statutory interpretation, therefore, the First Circuit's holding was wrong.

D. Judicial Equation Of Rejection Of A Trademark License With Termination Improperly Engrafts A New Exception Onto The Statutory Effect Of Rejection Of Such Licenses

When, in 1988, Congress passed the Intellectual Property Bankruptcy Protection Act that codified Section 365(n) for the rejection of "intellectual property" licenses, it considered the possibility of including "trademarks" within that provision but ultimately declined to do so.[5] The Senate Report on the legislation observed that "the bill does not address the rejection of executory trademark, trade name or service mark licenses by debtor-licensors . . . . Since these matters could not be addressed without more extensive study, it was determined to postpone congressional action in this area and to allow the development of equitable

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[5] As amended by the 1988 legislation, the Bankruptcy Code defines the term "intellectual property" as "(A) trade secret; (B) invention, process, design, or plant protected under title 35; (C) patent application; (D) plant variety; (E) work of authorship protected under title 17; or (F) mask work protected under chapter 9 of title 17; to the extent protected by applicable nonbankruptcy law." 11 U.S.C. §101(35A).

treatment of this situation by bankruptcy courts." S. REP. NO. 100-505, 100th Cong., 2d Sess. at 5 (1988).

The Senate Report evidences three crucial realities regarding trademark licenses and how they fare under Section 365. The first, explicitly addressed by the statute, is that trademark licenses are not covered by Section 365(n).[6] Second, as the drafters expressly recognized, "[n]or does the bill address or intend any inference to be drawn concerning the treatment of executory contracts which are unrelated to intellectual property." *Id.* Trademarks are not "intellectual property" included in Section 365(n). Absent any manifest intention to the contrary, where they are executory, trademark licenses should be treated in the general fashion of any other executory contract. The final consideration, albeit more subtle but equally important, is that trademark licenses are not specifically addressed by any other exception in Section 365. If they had been, Congress either would have said so or would have omitted the reference to trademarks in the Senate Report. Accordingly, rejection of trademark licenses falls squarely under the general provision where the Code unambiguously treats a rejected contract as having only been breached, not terminated.

Although Congress contemplated the development of equitable treatment for trademark licenses by the bankruptcy courts, the statute in no

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[6] *But see In re Crumbs, Inc.*, 522 B.R. 766, 780 (Bankr. D.N.J. 2014) (concluding, on equitable grounds, that a trademark license is not abrogated upon rejection, but further stating that "[t]rademark [l]icensees can be protected by §365(n), notwithstanding the omission of 'trademarks' from the Bankruptcy Code").

way created or authorized the courts to create treatments wholly inconsistent with Section 365 in general. "While the Bankruptcy Court is a court of equity, the Bankruptcy Code 'does not authorize freewheeling consideration of every conceivable equity.'" *Midlantic Nat'l Bank v. New Jersey Dep't of Env't Prot.*, 474 U.S. 494, 514 (1986); *accord RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 649 (2012) ("[I]t is our obligation to interpret the Code clearly and prudently using well-established principles of statutory construction."). "Equitable treatment" of trademark licenses that results in divestiture of the licensee's rights following the debtor's deemed breach (through rejection) departs entirely from the historical understanding and operation of rejection. *See In re Exide Techs.*, 607 F.3d at 967-68 (Ambro, J., concurring) (because rejection only constitutes a breach under Section 365(g), "rather than reasoning from negative inference to apply [*Lubrizol*] to this dispute, the Courts here should have used, I believe, their equitable powers to give [the debtor] a fresh start without stripping [the licensee] of its fairly procured trademark rights."); *accord Sunbeam Prods., Inc.*, 686 F.3d 372; *see also* 3 COLLIER ON BANKRUPTCY ¶ 365.10[3] (A. Resnick & H. Sommer eds., 16th rev. ed. 2018) ("If rejection terminates the contract or lease, such termination may have consequences that affect parties other than the debtor and the other party to the contract or lease . . . . 'Rejection' constitutes a 'breach' pursuant to section 365(g), except to the extent that a contract or lease is 'terminated' pursuant to section 365(h) or (i).").

II. Rejection Of A License Agreement That Has Granted The Licensee All Substantial Rights In A Trademark Cannot Prevent The Licensee From Using That Trademark

Some trademark licenses are executory and some are not. Where a trademark license agreement grants the licensee all substantial rights to the trademark, the license agreement operates as an assignment of the trademark to the licensee. In that case, the licensee has a right to use the trademark that has been assigned to it, and the debtor's rejection of the license agreement is of no consequence to the licensee's continued use.

Whether a licensee has been granted all substantial rights under a license agreement is an assessment made on a case-by-case basis under applicable state law. As the Federal Circuit recognized in the context of patent license agreements:

> [t]o determine whether an assignment of patent rights was made, we must "examine whether the agreement transferred all substantial rights" to the patents and "whether the surrounding circumstances indicated an intent to do so."

AsymmetRx, Inc. v. Biocare Med., LLC, 582 F.3d 1314, 1319 (Fed. Cir. 2009) (*citing Vaupel TextilmaschinenKG v. Meccanical Euro Italia S.P.A.*, 944 F.2d 870, 875 (Fed. Cir. 1991)); *see WiAV Solutions LLC v. Motorola, Inc.*, 631 F.3d 1257, 1259 (Fed. Cir. 2010) ("If the patentee transfers all substantial rights under the patent, it amounts to

an assignment and the assignee may be deemed the effective patentee. . . ."). And as this Court held over a century ago, "[w]hether a transfer of a particular right or interest under a patent is an assignment or a license does not depend upon the name by which it calls itself, but upon the legal effect of its provisions." *Waterman*, 138 U.S. at 256.

To that end, in determining whether a patent license agreement transfers all substantial rights to a licensee and, thus, renders the licensee an "effective patentee," courts examine, for example:

- the licensee's right to make, use, and sell or service a product under the patent;
- the licensee's right to sue and recover damages for infringement;
- whether the licensor can retain damages for any infringement suits brought by the licensee;
- the ability to sub-license;
- the ability of a licensor to supervise and control the licensee's activities; and
- the obligation to pay statutory maintenance fees.

Alfred E. Mann Found. for Sci. Research v. Cochlear Corp., 604 F.3d 1354, 1360-61 (Fed. Cir. 2010).

Likewise, certain District Courts have analyzed the same factors to determine whether a

trademark licensee has been granted all substantial rights in a trademark such that the licensee is the "effective registrant" with standing to sue for infringement under 15 U.S.C. §1114. *Kroma Makeup EU, LLC v. Boldface Licensing + Branding, Inc.*, 264 F. Supp. 3d 1294, 1300 n.3 (M.D. Fla. 2017) (observing that a trademark licensee may have all substantial rights where the license granted the licensee the right of exclusivity, the right to transfer, and the right to sue infringers); *see also Aceto Corp. v. TherapeuticsMD, Inc.*, 953 F. Supp. 2d 1269, 1279 (S.D. Fla. 2013).

At bottom, this Court's decision in *Waterman* provides the test for determining whether a patent licensee or trademark licensee is the owner by assignment of the patent or trademark. If the license agreement is, upon proper examination, an assignment because it transfers all substantial rights to the licensee, then the license agreement is not an executory contract because, as a result of the assignment, there would be no further material performance obligations due and owing from the debtor-licensor.

An executory contract requires that each party have an ongoing obligation under the contract as of the commencement of the bankruptcy case. *In re Exide Techs.*, 607 F.3d at 962 (a contract is executory when both parties have unperformed obligations that would constitute a material breach if such obligations are not performed; no material obligations remain under trademark license); *United States Bank Trust Nat'l Ass'n v. AMR Corp., (In re AMR Corp.)*, 730 F.3d 88, 106 (2d Cir. 2013); *Gencor Indus., Inc. v. CMI Terex Corp. (In re Gencor Indus., Inc.)*, 298 B.R. 902, 913 (Bankr. M.D. Fla. 2003)

("Because neither party had any on-going affirmative duty that would cause a material breach if unperformed, the Court finds that. . . . the settlement agreement and the related irrevocable [patent] license were not executory contracts within the meaning of Section 365 of the Bankruptcy Code."). And if it is not executory, then the license agreement cannot be rejected by the debtor because Section 365(a) allows rejection of only executory contracts.

But if the license agreement transfers only some, but not all, substantial rights, then the licensee is not an assignee of the trademark and the license agreement may qualify as an executory contract because both licensor and licensee will have continuing obligations under the license agreement.

If, however, the rights that are transferred to the licensee rise to the level of a property interest, such interest cannot be divested by operation of bankruptcy law. *Abboud v. Ground Round, Inc. (In re Ground Round, Inc.)*, 482 F.3d 15 (1st Cir. 2007) ("Where a claimant holds something akin to a property right in something held by the debtor, that right survives bankruptcy and remains enforceable to recover the property from the estate, except where that right is cut off by provisions of the Bankruptcy Code."); *see also Trade-Mark Cases*, 100 U.S. 82, 92 (1879) ("The right to adopt and use a symbol or a device to distinguish the goods or property made or sold by the person whose mark it is, to the exclusion of use by all other persons, has been long recognized . . . . [as] a property right for the violation of which damages may be recovered in an action at law. . . . ").

To determine the nature of a non-debtor's interest, courts will examine the applicable state law.

Butner, 440 U.S. at 55 ("Property interests are created and defined by state law."). Thus, a court should conduct a case by case analysis to determine whether the rights transferred to a licensee are akin to a property interest such that the licensee is entitled to the continued use of the trademarks post-rejection.

III. The Quality Control Requirements Of Trademark Licensing Law Do Not Preclude The Non-Debtor's Continued Use After Rejection By The Licensor

The law governing trademark licensing requires that the quality of the goods or services provided under the licensed mark be subject to the licensor's reasonable control in order to ensure the validity of the license and of the mark itself as a consistent source-indicator. *See Draeger Oil Co., Inc. v. Uno-Ven Co.*, 314 F.3d 299, 300-01 (7th Cir. 2002) ("[F]or a trademark to remain enforceable . . . the owner must, through monitoring, testing, and other means, maintain the quality and uniformity of the trademarked product . . . so that consumers are not deceived by the identity of names into buying a product different from what they reasonably expected.") (citations omitted).

The requirement of quality control, originally developed in pre-Lanham Act decisional law, was "carried forward" into the provisions of the Lanham Act (the current federal statute governing federally registered marks). *Dawn Donut Co. v. Hart's Food Stores, Inc.*, 267 F.2d 358, 367 (2d Cir. 1959) (tracing the pre-Lanham Act development of the doctrine and its implementation in Sections 5 and 45 of the Lanham Act (15 U.S.C. §§1055, 1127)); *see also* 15

U.S.C. §1055 (use of a mark by a "related company" of the owner will not affect the mark's validity) and §1127 (defining "related company" as "any person whose use of the mark is controlled by the owner of the mark with respect to the nature and quality of the goods or services . . . .").

In the present case, the license agreement provides that certain uses of the trademarks by the licensee are pre-approved, and that the debtor-licensor has "the right to review and approve" other uses. *In re Tempnology, LLC*, 879 F.3d at 402. Regardless, a licensor's obligation to monitor and, if necessary, police product quality, exists under trademark law whether or not such provisions are expressly included within the terms of a written license agreement. *See* 3 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION §18:59 (5th ed. Nov. 2018) ("A contractual provision giving the licensor the right to supervise and control the nature and quality of the licensee's goods and services is not an essential element if adequate quality control was in fact exercised.") (*citing Dawn Donut*, 267 F.2d at 367).

A licensor's quality control obligation, which originates outside of bankruptcy law, is still present in the event of a debtor-licensor's rejection of a trademark license under Section 365. The general rule under Section 365(g) that a "rejection" does not equate to a "termination" of the agreement pertains for two reasons.

First, if the non-debtor licensee chooses to continue to exercise his right under the agreement to use the trademark, that decision will not relieve the licensee of any obligation contained in the license agreement to satisfy quality standards. Such

obligation will continue pursuant to the terms of the license agreement.

Second, to maximize the benefits of the relief afforded by the bankruptcy court, a debtor-licensor will make reasonable efforts to preserve the value of the assets of the bankruptcy estate including the trademark and related goodwill. One of those efforts within the licensor's control is, consonant with the licensor's obligation under trademark law, to monitor and police the licensee's product quality. The licensor's actions in monitoring product quality, however, are not the result of any contractual obligations owed by the licensor to the licensee, but, rather result from the very practical undertaking to preserve the value of the assets of the bankruptcy estate. *In re SIMA Int'l, Inc.*, 2018 Bankr. Lexis 1455 at *19 n.24 (Bankr. D. Conn. 2018) (the debtor-licensor's burden of maintaining quality under the license is required by "the legal rigors of trademark policing, not contractual obligations . . . .") (emphasis in original).

The Bankruptcy Code includes provisions designed to enable the debtor or trustee to preserve or enhance the value of the estate assets. *In re Satcon Tech. Corp.*, 2012 Bankr. Lexis 5812, *16 (Bankr. D. Del. 2012) (recognizing "the Debtors' obligation to seek to maximize the value of its assets for the benefit of their constituents."). For example, the automatic stay under 11 U.S.C. §362(a)(1) expressly addresses actions "against the debtor." Actions commenced by the debtor may continue, and often are continued, in order to preserve or enhance the value of assets. *See, e.g., Haag v. United States*, 485 F.3d 1, 4 (1st Cir. 2007) (automatic stay did not

prevent debtor from continuing his appeal challenging a federal tax lien).

Acting to maintain product quality within a trademark licensing situation is but one example of asset-protective action that the debtor may take within the permissive ambit of bankruptcy law.

CONCLUSION

For the above stated reasons, the NYIPLA respectfully requests that the Court: (1) conclude that the rejection of a trademark license agreement by a debtor-licensor under Section 365(g) does not authorize the debtor-licensor to terminate the trademark license agreement; and (2) in the event that it decides that Section 365(g) does allow for termination, apply the analysis outlined above to determine whether the legal effect of the transfer of any right or interest under the license agreement precludes termination.

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